

EDITOR'S NOTE

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85-6207-CFY
Status: GRANTED

Title: Barry Dean Klayminc, Petitioner
v.
United States ex rel. Vuitton et Fils S.A., Louis
Vuitton S.A.

Docketed:
January 16, 1986
Court: United States Court of Appeals
for the Second Circuit
Counsel:
85-1329 Counsel for petitioner: Cohen, James A.
also:
85-455 Counsel for respondent: Bainton, J. Joseph

Entry	Date	Note	Proceedings and Orders
	Jan 16 1986	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
	Mar 19 1986		REINSTATED. April 4, 1986
	Apr 4 1986	P	Response requested. (Due May 5, 1986 - NONE RECEIVED)
	May 6 1986		BRIEF OF RESPONDENT VUITTON ET FILS S.A. IN OPPOSITION FILED. VIDEDED.
	May 6 1986		REINSTATEMENT. May 22, 1986
	May 14 1986	N	MOTION OF PETITIONER TO DEFER CONSIDERATION OF THE PETITION FILED.
	Jun 5 1986		REINSTATEMENT. JUNE 19, 1986
	Jun 23 1986		PETITION GRANTED. THE MOTION OF PETITIONER FOR LEAVE TO PROCEED IN FORMA PAUPERIS IN NO. 85-6207 IS GRANTED. THE CASE IS CONSOLIDATED WITH 85-1329, AND A TOTAL OF ONE HOUR IS ALLOTTED FOR ORAL ARGUMENT.
	JUL 21 1986		ORDER EXTENDING TIME TO FILE BRIEF OF PETITIONER ON THE MERITS UNTIL SEPTEMBER 9, 1986.
	Sep 3 1986		ORDER EXTENDING TIME TO FILE BRIEF OF RESPONDENT ON THE MERITS UNTIL OCTOBER 27, 1986.
	Sep 5 1986		RECORD FILED.
	Sep 8 1986		JOINT APPENDIX FILED. VIDEDED.
	Sep 6 1986		BRIEF AMICUS CURIAE OF UNITED STATES FILED.
	Sep 12 1986	S	MOTION OF THE SOLICITOR GENERAL FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE AND FOR DIVIDED ARGUMENT FILED.
	Sep 8 1986		BRIEF OF PETITIONER BARRY D. KLAYMINC FILED. VIDEDED.
	Oct 14 1986		MOTION OF THE SOLICITOR GENERAL FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE AND FOR DIVIDED ARGUMENT GRANTED.
	Nov 14 1986		BRIEF OF RESPONDENT UNITED STATES FILED. VIDEDED.
	Nov 14 1986		LOGGING RECEIVED. (3 COPIES - PRINTED).
	NOV 14 1986		SET FOR ARGUMENT. TUESDAY, JANUARY 13, 1987. THIS CASE IS CONSOLIDATED WITH NO. 85-1329. (SRC CASE) (1 HOUR)
	Nov 25 1986		REINSTATEMENT.
	Dec 30 1986	X	REPLY BRIEF OF PETITIONER BARRY D. KLAYMINC FILED. VIDEDED.
	Jan 13 1987		ARGUED.

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NO. 85-6207

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RECEIVED

JAN 16 1986

OFFICE OF THE CLERK
SUPREME COURT U.S.

BARRY DEAN KLAYMINC,

Petitioner,

- against -

UNITED STATES OF AMERICA ex rel.
VUITTON ET FILS S.A., and
LOUIS VUITTON S.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES A. COHEN, ESQ.
Washington Square Legal
Services, Inc.
715 Broadway, 4th Floor
New York, N.Y. 10003
(212) 505-7400
Counsel of Record
for Petitioner

ANDREW HORWITZ
GAIL HEATHERLY
THOMAS FARRELL
Legal Interns
New York University
School of Law
On the Petition

J. JOSEPH BANTON, ESQ.
Reboul, MacMurray, Hewitt,
Maynard & Kristol
45 Rockefeller Plaza
New York, N.Y. 10020
(212) 841-5700
Counsel of Record
for Respondent

January 15, 1986

128 P

QUESTIONS PRESENTED

1. Whether interested private attorneys may, consistent with the due process clause of the Fifth Amendment and Fed. R. Crim. P. 42(b), prosecute criminal contempt proceedings.
2. Whether, pursuant to Fed. R. Crim. P. 42(b), an interested private attorney may direct an unsupervised investigation in order to obtain evidence to be used in a criminal contempt trial.
3. Whether the Court of Appeals erred in affirming criminal contempt sentences of six months to five years.

PARTIES TO THE PROCEEDINGS

Petitioner Barry Dean Klayminc was the appellant below.

The Appellees below were Vuitton et Fils S.A. and Louis Vuitton S.A., representing the United States of America.

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Petitioner Barry Dean Klayminc respectfully prays
that a writ of certiorari issue to review the judgment of the
United States Court of Appeals for the Second Circuit.

CITATION TO OPINION BELOW

The decision of the United States Court of Appeals
for the Second Circuit from which review is sought was issued
on December 16, 1985. The opinion is reported at ___ F.2d ___
and is printed as Appendix A to this petition.

JURISDICTION

The judgment of the United States Court of Appeals
for the Second Circuit was entered on December 16, 1985. This
Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Rule 42(b) of the Federal Rules
of Criminal Procedure, and the Due Process Clause of the Fifth
Amendment of the United States Constitution.

Rule 42(b) states:

(b) Disposition Upon Notice and Hearing. A
criminal contempt except as provided in
Subdivision (a) of this rule shall be
prosecuted on notice. The notice shall state
the time and place of hearing, allowing a
reasonable time for the preparation of the
defense, and shall state the essential facts
constituting the criminal contempt charged and
describe it as such. The notice shall be given
orally by the judge in open court in the
presence of the defendant or, on application of
the United States attorney or of an attorney
appointed by the court for that purpose, by an
order to show cause or an order of arrest. The
defendant is entitled to a trial by jury in an
ycase in which an act of Congress so provides.
He is entitled to admission to bail as provided
in these rules. If the contempt charged

involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

This case was prosecuted by interested private parties who were specially appointed and who utilized an extraordinary undercover investigation which was unsupervised by the United States or a disinterested prosecutor. Petitioner was convicted of aiding and abetting a criminal contempt. 18 U.S.C. §§ 2, 401 (3). The five defendants who went to trial received sentences of imprisonment ranging from six months to five years.

This prosecution arose from an ABSCAM-style "sting" investigation, dubbed "BAGSCAM" by the press, which was conducted in early 1983 by Louis Vuitton, the well-known luggage manufacturer. The "sting" featured the talents of Mel Weinberg, well known for his role in ABSCAM. Shortly after the investigation began, private counsel for Vuitton was specially appointed by the court to investigate and prosecute seven defendants for alleged violation of a civil injunction entered in the District Court in favor of Vuitton against members of the Klaymine family and family companies.

Since 1978, the special prosecutor, J. Joseph Bainton, Esq. ("Bainton"), a partner in the firm of Reboul, MacMurray, Bewitt, Maynard & Kristol ("Reboul, MacMurray"), has been retained as the attorney in charge of Vuitton's efforts to enforce its trademark rights.

The criminal contempt arose from a civil trademark infringement action, Vuitton et Fils S.A. v. Karen Bags, Inc., 78 Civ. 5863 (CLB).¹ In a settlement of that case, petitioner, his father and the family companies agreed to pay \$100,000 plus

¹ Counterfeiting trademark products did not become criminal until October 12, 1984. See 18 U.S.C. § 2320.

interest and consented to the entry of a permanent injunction which formed the basis for the instant criminal proceeding. The injunction, entered on July 30, 1982, proscribed in pertinent part:

(b) manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any product bearing any simulation, reproduction, counterfeit, copy or colorable imitation of Vuitton's Registered Trade-Mark 297,594[.]²

In early 1983, Vuitton retained Kanner Security Group, Inc., a Florida private investigatory firm, for the purpose of undertaking a "sting" operation to advance Vuitton's trademark enforcement campaign. The undercover services of Mel Weinberg ("Weinberg"), the former confidence man who attained notoriety in the wake of ABSCAM, were integral to the operation of Vuitton's "sting," which was supervised by Bainton.

As a result of information concerning possible counterfeit activity gathered by Weinberg, on March 31, 1983, Bainton, identifying himself as Vuitton's attorney, requested that the Court appoint he and Robert P. Devlin, then an associate at Bainton's firm, special prosecutors pursuant to Rule 42(b), Fed. R. Crim. P. Judicial authorization to undertake certain extraordinary investigative measures was also requested. Vuitton's application was granted.

Consistent with the "sting" technique, Weinberg approached Sol Klayminc (petitioner's father, hereafter "Klayminc") and proposed a joint venture to produce and ultimately distribute counterfeit Vuitton handbags. Klayminc owned an interest in a factory in Haiti, which was to be the manufacturing site. However, he did not have the necessary machinery, supplies or capital to

² Since the injunction is the functional equivalent of the statute, it is set forth in Appendix D.

produce any merchandise, and nothing was ever produced in Haiti. The entire project was conditioned on Weinberg's supplying all the basic materials and putting up the capital, as well as buying the finished product.

The investigation also gathered information concerning the merits of Klayminc's defamation lawsuit³ and the specifics of his planned discharge in bankruptcy. The undercover tapes produced by the special prosecutor also revealed numerous instances in which various defendants expressed the view that the manufacture of counterfeit merchandise in Haiti for distribution outside the United States would not violate the Klaymincs' obligations under the injunction. Weinberg in turn picked up this theme, and repeatedly assured the parties that extraterritorial counterfeiting and distribution would not be criminal.⁴ Almost all telephone

3 In December, 1982, before Bainton's appointment as special prosecutor, Klayminc filed a defamation action against Bainton and Reboul, MacMurtry in New York State Supreme Court, New York County. The complaint alleged that the following statement, purportedly made by Bainton at a press conference concerning Klayminc and attributed to him in the Wall Street Journal, was false and defamatory:

. . . [H]e was fingerprinted and photographed right next to the muggers and mother-rapists. I'm sure that was an experience he'll remember.

The complaint sought monetary recovery for lost business and damage to Klayminc's reputation totaling \$2,250,000. This action, pending during the "sting" and criminal trial, was ultimately dismissed.

4 Typical of these exchanges was a conversation between Weinberg and Sol's wife, Sylvia Klayminc, on April 8, 1983. After Weinberg informed Sylvia of the plan, he told her she could soon be selling Vuittons again. Sylvia responded: "No. I wouldn't be able to do it here." Weinberg: "Why?" Sylvia: "Ah, you're not allowed to do it here." Weinberg: "Why?" Sylvia: "Ah, you're not allowed to do it here, I mean, in the United States." Weinberg: "Well, we'll ship to you in Europe, then." When Weinberg indicated that the casinos he represents were in this country, Sylvia protested:

conversations and in-person meetings were audio- or videotaped. Despite a great deal of talk, only 26 counterfeit bags, not made in Haiti, were produced.

Based on evidence developed during the "sting" investigation, Bainton obtained an order to show cause ("OSC") for both civil and criminal contempt⁵ against petitioner by other individuals and various corporate defendants.⁶ At the direction of the court, Bainton forwarded copies of the order and his supporting affidavit to Laurence Pedowitz, Esq., Chief of the Criminal Division, United States Attorney's Office, together with a brief cover letter affirming Bainton's willingness to "make the tape recordings and other evidence available" for the United States Attorney's review, if so requested. According to Bainton, Pedowitz subsequently telephoned Bainton and asked him what it was about. After being told, Pedowitz wished him good luck.

While pre-trial motions urging revocation of Bainton's appointment were pending, Vuitton, by Bainton, filed a complaint objecting to Klayminc's and his wife's discharge in bankruptcy and alleging facts gathered during the criminal investigation. On December 6, 1983, at an evidentiary hearing in the United States Bankruptcy Court for the Southern District of Florida, Bainton introduced into evidence, through Mel Weinberg, a number of

*[N]ot in the United States." (DX EI-T, 7-8). Later in the same conversation, Weinberg said "[w]hat he's got to be careful of . . . anything he brings into the States, that they don't get wise, because they'll be looking for. . . [.]" Sylvia protested again: "You mean, that stuff? He's not going to . . . [.]" Weinberg: "No, no, no, no. I'm talking about money." (DX EI-T p. 22)

⁵ The OSC is set out in full in Appendix E.

⁶ Two of the individuals, Rochman and Pariseault, pleaded guilty to contempt as a petty offense.

exhibits obtained during the course of the criminal "sting" investigation.

On April 19, 1984, Judge Brieant denied petitioner's timely motions to disqualify the special prosecutors, stating that:

[t]he appointment of one of the attorneys in a civil action to prosecute a criminal contempt arising from a violation of the Court's orders in such an action is a long-standing practice the validity of which, in principle, is not subject to question.

United States ex rel. Vuitton et Fils S.A. v. Karen Bags, 592 F. Supp. 734, 739 (S.D.N.Y. 1984) (Appendix C at C-7). The court relied on Second Circuit precedent established in Musidor, B.V. v. Great American Screen, 658 F.2d 60 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982). Rejecting defendants' specific claims of both an actual conflict of interest and the appearance of such conflict, the court concluded that Klayminc's defamation action was "frivolous" and that the use of evidence gathered under the mantle of special prosecutor to benefit a private client in a bankruptcy proceeding was "not regarded as sufficient to require disqualification." Id. at 746 & n. 6 (Appendix C at C-21 & n.6). The court upheld the granting of investigatory authority, holding that the "normal or commonly accepted meaning" of the words "to prosecute" makes it "clear that a special prosecutor's authority under Rule 42 extends beyond simply presenting evidence in court" and includes the authority to investigate. Id. at 744 (Appendix C at C-16).

The jury deliberated for approximately two and a half days and convicted each defendant on May 24, 1984, of at least one paragraph in the OSC.

On June 20, 1984, Vuitton filed a motion for summary judgment in the related civil contempt action against petitioner, his father and three others, seeking to recover \$538,991.12 as

damages for civil contempt.⁷ This sum includes attorneys fees of more than \$300,000 and disbursements billed to Vuitton by Reboul, MacMurray in connection with the special prosecutors' investigative and prosecutorial labors in the criminal case. The summary judgment motion was denied.

On January 24, 1985, Judge Brieant denied defendants' motions to set aside the verdicts, to dismiss the order to show cause, for a new trial, and for a due process hearing. United States ex rel. Vuitton et Fils S.A. v. Karen Bags, 502 F.Supp. 1052 (S.D.N.Y. 1985) (attached as Appendix B). The court once again upheld the appointment of Bainton as special prosecutor with investigatory powers.

Citing "the rights of trademark holders" as the principal interest to be vindicated, Judge Brieant sentenced petitioner to nine months' imprisonment. The other defendants received custodial sentences ranging from six months to five years. Subsequently, on Bainton's recommendation, defendants Rochman and Pariseault were sentenced to probation. In addition, in his capacity as counsel for Vuitton, Bainton dismissed "with prejudice" all civil claims against Rochman. Both promises were contained in the "plea agreement" between Rochman and Bainton.

A divided panel of the Second Circuit affirmed the criminal contempt convictions. United States ex rel. Vuitton et Fils S.A. v. Klayminc, No. 85-1068 slip op. (2d Cir. December 16, 1985) (attached as Appendix A). The court upheld the appointment of the special prosecutors, relying, as did the trial court, on Musidor, supra, 658 F.2d 60. The court stated that it was "not persuaded that Bainton and Devlin were disqualified by their past

7 Neither defendants Rochman nor Pariseault were named in this motion.

connections with Vuitton's business, their involvement in previous lawsuits with the defendants, or by any of their conduct in this lengthy litigation." (Appendix A at A-11). Describing the defamation action as "clearly frivolous," the court held that it was "entitled to no weight" in its consideration of potential conflicts of interest. (Appendix A at A-10). Upholding the granting of investigatory authority, the court stated that the term "to prosecute," as used in Rule 42, "clearly encompasses the power to investigate and gather evidence through activities such as the Bagscam sting supervised by Bainton and Devlin." (Appendix A at A-12).⁸ The court dismissed petitioner's argument that Judge Brieant's jury instructions incorrectly permitted petitioner's conviction on a conspiracy to commit contempt theory, stating that "Barry has unduly focused on one line of a long charge which accurately and completely informed the jury." (Appendix A at A-13).⁹ The court also upheld the sentences imposed by Judge Brieant.

In a dissenting opinion, Circuit Judge Oakes¹⁰ asserted his belief that "the decision authorizing Bainton and Devlin to continue their investigation was incorrect." (Appendix A at A-23). Judge Oakes outlined the "compelling reasons" against granting investigatory authority to a private attorney:

[T]he private lawyer who participates in a sting operation almost necessarily runs afoul of the

8 In fact, Rule 42(b) does not contain the words "to prosecute." See discussion at pp. 15-17, infra.

9 In fact, a significant portion of the court's mens rea charge was couched in the language of conspiracy, which was not part of the injunction (Appendix D) or the OSC (Appendix E).

10 Judge Oakes' dissent is of particular interest since he was the author of Musidor.

canons of legal ethics; the private lawyer who represents an interested party also lacks the knowledge of legal constraints on the investigatorial process and freedom from bias that a public prosecutor would have.

(Appendix A at A-17). Among the problems associated with the privately supervised investigation in this case was the likelihood that the violation would never have occurred but for the investigation. "My reading of the record indicates . . . that the investigation may have been the proximate cause of the violation." (Appendix A at A-23).

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE SECOND CIRCUIT IS IN DIRECT CONFLICT WITH A DECISION OF THE SIXTH CIRCUIT AND INCONSISTENT WITH DECISIONS OF SEVERAL OTHER CIRCUITS.

The Second Circuit stands alone among the federal circuit courts in approving the appointment of an attorney in an underlying suit as a special prosecutor in a criminal contempt proceeding. In the case at bar, the Second Circuit dangerously extended this practice to allow the granting of investigatory powers to such a special prosecutor. If left uncorrected, this precedent empowers any attorney to be appointed special prosecutor to enforce any court order, and to use the full investigatory powers ordinarily reserved for the government.

The Sixth Circuit in Polo Fashions, Inc. v. Stock Buyers Int'l, Inc., 760 F.2d 698 (6th Cir. 1985), pet. for cert. filed, No. 85-455 (Sept. 17, 1985), squarely held that "an attorney for a party in underlying litigation may not conduct criminal contempt proceedings as sole or primary counsel." Id. at 705. The Polo case involved a prosecution for criminal contempt arising out of alleged violations of an injunction protecting Polo's registered trademarks. In reversing the defendants' convictions, the court

observed:

It is too much to expect an attorney committed to his client and the client's cause to recognize the 'twofold aim' referred to in Berger (295 U.S. 78) [representation of the public's interest and the government's commitment to the impartial administration of justice] when acting as a prosecutor in a proceeding which, if successful, can benefit immeasurably that client and his cause.

Id. at 705.11

In the case at bar, the Second Circuit stated that it was "not persuaded by the recent opinion of the Sixth Circuit." (Appendix A at A-11). Rather, the court relied exclusively on its prior decision in Musidor, supra, 658 F.2d 60. Pointing out that the Sixth Circuit relied on its supervisory authority, the Second Circuit disregarded Polo without addressing the merits of its holding and rejected defendants' objections to both the appointment of the special prosecutors and their supervision of the investigation. (Appendix A at A-11-12). Judge Oakes strongly disagreed with the practice of placing investigative responsibility in the hands of the parties' attorneys:

Through inclination and ignorance, as well as lack of responsibility to the public, to higher authorities or to an electorate, or a combination of these, private attorneys are likely to fail to exhibit the self-restraint in conducting an investigation and the candor in admitting errors that are required of prosecutors and are of critical importance if our system is to work properly.

(Appendix A at A-22).

The Fifth Circuit has also dealt with the propriety of appointing counsel for private parties as special prosecutors in criminal contempt proceedings. See Brotherhood of Locomotive Firemen and Enginemen v. United States, 411 F.2d 312 (5th Cir.

11 The Sixth Circuit's decision in Polo is currently pending before this Court on a petition for certiorari. The Solicitor General of the United States has been requested to file a brief regarding that petition.

1969). In vacating the defendants' convictions due to insufficient notice, the court recognized the conflicts of interest and the appearance of impropriety that inhere in such appointments:

The point is that those conflicting claims of undivided fidelity [to the client and to the pursuit of justice] present subtle influences on the strongest and most noble of men. The system we prize cannot tolerate the unidentifiable influence of such appeals.

It is the experience of this Court that the National Sovereign, through its chosen law officers, should be in control of criminal contempt proceedings.

Id. at 319.

The facts of this case highlight the conflict between the circuits. First, prosecutor Bainton's relationship with Vuitton is much more extensive than the one-time involvement of the special prosecutors that was condemned by the Sixth Circuit in Polo. Furthermore, Bainton's involvement, involving, as it did, the "sting" operation, went far beyond the straightforward prosecutorial functions performed by the Polo prosecutors. In addition to "interests" in the bankruptcy and defamation cases, there were also claims of impropriety during the investigation.¹² Indeed, Bainton's active participation in all phases of this proceeding exponentially exceeded the relatively benign posture Polo's prosecutors took toward the defendants there.

12 Counsel requested a post-verdict due process hearing, cf. United States v. Myers, 527 F. Supp. 1206 (E.D.N.Y. 1981), to develop, inter alia, the following claims: that the Klaymincs were improperly targeted; that Weinberg made threats against the defendants; that the special prosecutor intentionally permitted the evidence to remain ambiguous; and that the special prosecutor's agents told the defendants they were not committing crimes. The court denied this request for a hearing.

THE PRIMARY ISSUES IN THIS CASE INVOLVE QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. This Court Should Decide The Propriety of Appointing an Attorney for a Party in an Underlying Civil Suit as Special Prosecutor in a Criminal Contempt Proceeding.

The petitioner contends that it is improper to appoint a private attorney in an underlying civil suit to prosecute a criminal contempt proceeding. Such an appointment creates a tremendous potential for conflicts of interest, and presents the appearance of impropriety. For these reasons, appointments of this type have been condemned by the Fifth and Sixth Circuits and several state courts. See Brotherhood, supra, 411 F.2d 312; Polo, supra, 760 F.2d 698; State ex rel. Koppers Co. v. International Union of Oil, Chemical and Atomic Workers, 298 S.E.2d 827 (W. Va. 1982); Harthun v. District Court In and For Second Judicial District, 178 Colo. 118, 485 P.2d 539, 542 (1972); Peterson v. Peterson, 153 N.W.2d 825 (Minn. 1967); Leeman v. Vocelka, 32 N.W.2d 274, 278 (Neb. 1948).

In addition, it is clear from the opinions of the First and Seventh Circuits that such a practice would not be approved by those courts. See Ramos Colon v. United States Attorney for the District of Puerto Rico, 576 F.2d 1 (1st Cir. 1978); Kienle v. Jewel Tea Co., 222 F.2d 98 (7th Cir. 1955). The First Circuit in Ramos Colon, relying on Kienle, which dealt with the same basic legal issue, held that "[a] party to the original litigation has no standing to prosecute an action for criminal contempt or to take an appeal from the court's rejection of his allegations." Ramos Colon, supra, 576 F.2d at 5. Although neither opinion directly addressed the propriety of private parties' appointments as special prosecutors, the logic of these decisions strongly suggests that

such a practice would not be permitted.

The Second Circuit alone approves this controversial practice. The court's opinion in the present case attempts to minimize the importance to a criminal defendant of an impartial prosecutor: "If honestly convinced of the defendant's guilt, . . . [a prosecutor] is free, indeed obliged, to be deeply interested in urging that view by any fair means." (Appendix A at A-9) (quoting from Wright v. United States, 732 F.2d 1048 (2d Cir. 1984), cert. denied, 105 S. Ct. 778 (1985)).¹³ This self-evident observation clearly misapprehends the heart of the issue. The conflict of interest most seriously infringing upon a defendant's constitutional rights arises precisely when a special prosecutor is not "honestly convinced of the defendant's guilt," but has pledged his "undivided loyalty . . . to a party interested only in a conviction." Polo, supra, 760 F.2d at 705. In any case, the appearance of a conflict should cause disqualification since "the practical impossibility of establishing that the conflict has worked to defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice." Wright, supra, 732 F.2d at 1056 (quoting People v. Zimmer, 51 N.Y.2d 390, 395, 414 N.E.2d 705, 707, 434 N.Y.S.2d 206, 208 (1980)).

The Wright court emphasized the prosecutor's duty to

13 In stating this conclusion, the Second Circuit quoted from its earlier decision in Wright, supra, 732 F.2d at 1056. However, the use of Wright to support its argument is somewhat disingenuous, as Wright stands for the proposition that a defendant is entitled to a disinterested prosecutor. In Wright, the court pointed out that a prosecutor "is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged." Id. at 1056.

avoid even the appearance of a conflict of interest. Wright, Supra, 732 F.2d at 1055 (citing ABA Standards for Criminal Justice § 3-1.2 (2d ed.1980)), and distinguished its case from Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967), chiefly because there was no evidence of any pecuniary interest on the part of the prosecutor. Here, Bainton and his firm billed \$300,000 as attorneys fees and Vuitton has been, and continues to be, an important client of the firm.

In light of the controversial nature of the special appointment procedure and the gravity of the constitutional rights affected by this practice, this Court should resolve this important question of federal law.

B. This Court Should Decide the Propriety of Granting a Special Prosecutor the Full Investigatory Powers of the Government.

In the present case, the Second Circuit approved a novel and radical procedure that may have sweeping ramifications if left uncorrected. The court has extended the practice of appointing interested special prosecutors in criminal contempt proceedings to include bestowing full investigatory powers upon those prosecutors. Relying on defendants' "fail(ure) to cite any cases in which Rule 42 has been construed to limit the [investigatory] powers of the special prosecutor," the court held that "[t]he special prosecutor should have the same power to gather evidence and present that evidence as does any other government prosecutor." (Appendix A at A-11).

This precedent, if not reversed by this Court, will permit any attorney to prosecute a criminal contempt proceeding related to any court order, and to exercise the full investigatory powers of the Executive Branch. Thus, special prosecutors could convene grand juries,¹⁴ subpoena witnesses and documents to the

grand jury, apply for and execute search, arrest and wiretap warrants, and enter formal and informal plea and immunity agreements. In short, the vast powers of law enforcement can be exercised, completely unsupervised, by a private party's attorney.

In general, "sting" operations substantially increase the risk that the constitutional rights of the individuals involved will be jeopardized. See generally FBI Undercover Operations, Report of the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary House of Representatives Together with Dissenting Views, Ninety-Eighth Congress, Second Session, April, 1984. To protect the constitutional rights of the public, investigatory powers in general and "sting" operations in particular should be reserved for experienced and accountable law enforcement authorities. As in this case, an interested private prosecutor, through ignorance or devotion to his private client's interests, may violate "legal constraints on the investigatorial process" and create crimes that would not otherwise have occurred. (Appendix A at A-17).

Both Judge Brieant, Karen Bass, supra, 592 F. Supp. at 746 (Appendix C at C-22), and the Second Circuit, (Appendix A at A-10), stated that the district court's ability to oversee the case would safeguard the defendant's rights. This view ignores the principal problem with permitting a private prosecutor's use of extraordinary investigative techniques: the unreviewable nature of prosecutorial discretion. For example, from a civil action, Vuitton and Bainton obtained a private law (the injunction, Appendix D) applicable only to the Klaysmincs and those aware of its

14 Criminal contempts can be prosecuted by indictment. United States v. Mensik, 440 F.2d 1232, 1234 (4th Cir. 1971).

terms. Shortly thereafter, Vuitton and Bainton sent Weinberg to encourage the Klaymincs to violate the injunction. Vuitton and Bainton then criminally prosecuted the Klaymincs. The law has been privately created, investigated, and prosecuted. A myriad of discretionary prosecutorial decisions, such as the choice of methods, targets, and, ultimately, the decision whether to go forward with the prosecution at all, occurs outside the court's presence. Therefore, as a practical matter, the greater part of this criminal case is unreviewable by the court. Given the enormous discretion involved in the prosecutorial function, it is best left to the Executive Branch.

C. Rule 42(b) Does Not Permit Appointment of a Private Attorney to Prosecute a Criminal Contempt.

There is no statutory authorization for the appointment of a private attorney to prosecute a criminal case. Such a procedure violates the constitutional doctrine of separation of powers.

Under 28 U.S.C. § 547, all crimes against the United States, including criminal contempt, must be prosecuted by a duly authorized United States Attorney. The only specific statutory basis for the appointment of a private attorney to represent the United States in a criminal matter is found in 28 U.S.C. § 543, which authorizes the Attorney General to appoint private attorneys "to assist United States attorneys when the public interest so requires." *Id.* (emphasis added).

However, the Second Circuit has interpreted Rule 42(b) to authorize the appointment of a private attorney to prosecute a criminal contempt proceeding. Musidor, supra, 658 F.2d 60.15 The

15 In In re C.B.S., Inc., 570 F. Supp. 578 (E.D. La. 1983).

plain language of Rule 42(b) and the history behind its adoption belie this interpretation.

Rule 42(b), as is plain from its language, is simply a notice provision. In describing the purpose of the sentence quoted above, the Advisory Committee on Rules stated in Note 2 to Subdivision (b):

. . . The requirement in the second sentence that the notice shall describe the criminal contempt as such is intended to obviate the frequent confusion between criminal and civil contempt proceedings and follows the suggestion made in McCann v. New York Stock Exchange, 80 F.2d 211 [(2d Cir. 1935), cert. denied, 299 U.S. 603 (1936)].

Notes of the Advisory Committee, Federal Rules of Criminal Procedure.

The McCann decision cited by the Rules Committee was a Learned Hand opinion dealing with the issue of notice, which also contained dicta suggesting that a court may wish to appoint a private attorney to prosecute a criminal contempt proceeding. The Second Circuit has mistakenly concluded that the Rules Committee intended to adopt not only McCann's notice holding, but also its dicta on private prosecutors. However, even assuming arguendo that the Rules Committee intended to rely on McCann's dicta in the manner assumed by the Second Circuit, that reliance would be of questionable legality. McCann, decided in 1935, predates modern

appeal dismissed sub nom. United States v. McKenzie, 735 F.2d 907 (5th Cir. 1984), the district court appointed disinterested private attorneys to prosecute a criminal contempt after the United States Attorney refused to prosecute. The district court then dismissed the criminal contempt. The Fifth Circuit dismissed the private prosecutors' appeal, holding that they did not represent the United States, and their role as representatives of the district court terminated when the district court dismissed the contempt proceeding. In view of its disposition of the case, the Fifth Circuit did not address the propriety of the private attorney appointment. United States v. McKenzie, 735 F.2d 907, 910 n.11 (5th Cir. 1984).

case law extending constitutional protection to those charged with criminal contempt.¹⁶

Article II, section 3 of the United States Constitution grants to the Executive Branch the exclusive power to prosecute criminal offenses. As the Fifth Circuit pointed out in United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965):

It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.

Id. at 171. The practice approved by the Second Circuit, however, allows just this sort of judicial interference with the discretionary powers of the United States attorneys. Under the Second Circuit's interpretation of Rule 42(b), a court can appoint a private party to prosecute a criminal contempt case that the United States Attorney's Office has explicitly declined to prosecute. The court's exercise of such authority would blatantly violate the separation of powers doctrine.¹⁷

16 A defendant charged with a serious criminal contempt has all of the protections afforded a defendant charged with any other crime, except: a statutorily proscribed maximum sentence; the right to indictment by grand jury (an issue which has not yet been decided by this Court); and, under the Second Circuit decision, the right to a disinterested prosecutor.

17 Violations of court orders committed out of the court's presence are said to offend the court's authority, thus justifying initiation of contempt proceedings by the judge. However, the party who obtained the original court order and society are the injured parties, not the court. See generally Euhn, Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury, 73 Mich. L. Rev. 483 (1975).

III

THIS COURT SHOULD REVIEW THE EXCESSIVE AND DISPROPORTIONATE SENTENCE IMPOSED ON PETITIONER.

Federal appellate courts have "a special responsibility for determining that the power [to impose sentences in contempt cases] is not abused, to be exercised if necessary by reversing . . . the sentences imposed." Green v. United States, 356 U.S. 165, 188 (1958). Further, the "punishment of criminal contempt should reflect the least possible power adequate to the end proposed." Anderson v. Dunn, 19 U.S. (* Wheat.) 204, 203-31 (1821). The sentence of nine months' imprisonment for petitioner does not represent the minimum sentence necessary to accomplish the purposes of criminal contempt sanctions, and, therefore, should be reviewed and revised by this Court.

First, the purpose of sentence was improperly premised on vindicating Vuittion's property interests and not on the proper punitive or deterrent purpose of a criminal contempt sentence. The punishment in criminal contempt proceedings, contrary to that in civil contempt cases, is not for the benefit of the complainant, but is "to vindicate the authority of the court." Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911). Any prison sentence imposed should not operate as "coercive in nature but solely as punishment for the completed act of disobedience." Id. at 442-43. Vuittion's interests should not have been considered as a basis for petitioner's sentence, and, therefore, the sentence is improper.

Second, the sentence imposed on petitioner does not promote the purpose of deterrence, since there is no evidence that his actions ever went beyond a mere willingness to participate in a possible future scheme masterminded almost entirely by Weinberg. (See OSC, Appendix E). In fact, as recognized by Judge Oakes in

his dissent, but for the inducements offered in the "sting," no violation of the injunction may ever have occurred. (Appendix A at A-23). Both petitioner's minimal involvement in the proposed scheme and the enticement to violate the injunction urged by Weinberg indicate that there is little deterrent effect in the sentence.

Third, petitioner's sentence was disproportionate to the sentences of other defendants who were more involved than he in the proposed counterfeiting scheme. See United States v. Gracia, 755 F.2d 984 (2d Cir. 1985). Specifically, defendants Pariseault (an attorney) and Rochman, although more culpable in the proposed scheme, received sentences of probation. Also, the five year sentence imposed on Klayminc, against which the sentences of all other defendants were proportionately derived, is inappropriate in that it was perceived by the Court as the maximum sentence. A maximum sentence for Klayminc is clearly excessive where no "completed act of disobedience" was shown by him. Further, a five year sentence is the maximum allowable under the new trademark & counterfeiting statute, 18 U.S.C. § 2320 (1984), and is permitted only where the actual or attempted transfer of goods is accomplished. Therefore, since the sentence imposed on Klayminc is patently excessive, the sentence imposed on petitioner is similarly excessive since it is proportionate to and derived from that imposed on Klayminc. For these reasons, petitioner's sentence is both excessive and disproportionate and should be reviewed and revised by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

James A. Cohen
AMES A. COHEN
Washington Square Legal Services, Inc.
715 Broadway, 4th Floor
New York, N.Y. 10003
(212) 505-7400

ANDREW HORWITZ
GAIL HEATHERLY
THOMAS FARRELL
Legal Interns -
New York University
School of Law
On the Petition

No. 85 -

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1985

BARRY DEAN KLAYMINC,

Petitioner,

- against -

UNITED STATES OF AMERICA ex rel.
VUITTON ET FILS S.A., and
LOUIS VUITTON S.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

JAMES A. COHEN, ESQ.
Washington Square Legal
Services, Inc.
715 Broadway, 4th Floor
New York, N.Y. 10003
(212) 505-7400
Counsel of Record
for Petitioner

ANDREW HORWITZ
GAIL HEATHERLY
THOMAS FARRELL
Legal Interns
New York University
School of Law
On the Petition

J. JOSEPH BAINTON, ESQ.
Reboul, MacMurray, Hewitt,
Maynard & Kristol
45 Rockefeller Plaza
New York, N.Y. 10020
(212) 841-5700
Counsel of Record
for Respondent

January 15, 1986

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1351, 1312, 1305, 1294, 1354

August Term, 1984

Argued: June 14, 1985

Decided: December 16, 1985

Docket Nos. 85-1068, 85-1075, 85-1076
85-1077, 85-1078

-----x
UNITED STATES OF AMERICA ex rel.
VUITTON ET FILS S.A., and
LOUIS VUITTON S.A.,

Appellee,

- against -

BARRY DEAN KLAYMINC, NATHAN HELFAND,
GEORGE CARISTE, SOL N. KLAYMINC, and
GERALD J. YOUNG,

Appellants.

-----x
Before: LUMBARD, OAKES, and WINTER, Circuit Judges.

Appeal from criminal contempt convictions by jury in the
Southern District of New York (Charles L. Brieant, J.) for
violating a permanent injunction prohibiting trademark infringement
in a case prosecuted by private attorneys of the trademark owner
appointed by the Court under Fed. R. Crim P. 42(b).

Affirmed.

Judge Oakes dissents in a separate opinion.

James A. Cohen (Washington Square
Legal Services, Inc., New York,
N.Y., Paul Davison, Samia Fam,
Lauren G. Gross, Michael
Abelson, Carla Hinton, Legal
Interns, New York University
School of Law, of counsel), for
Appellant Barry Dean Klayminc.

Thomas R. Matarazzo, Brooklyn,
N.Y., for Appellant Helfand.

Mitchel B. Craner, New York, N.Y.,
for Appellant Cariste.

William P. Weininger, New York,
N.Y. (Samuel & Weininger, New
York, N.Y., Walter Kraslow, of
counsel), for Appellant Sol N.
Klayminc.

Leonard J. Comden, Tarzana,
California (Wasserman, Comden &
Casselman, Tarzana, California,
of counsel), for Appellant
Young.

J. Joseph Bainton, New York, N.Y.
(Robert P. Devlin, Steven H.
Reisberg, Karen J. Pordum, Law
Student, New York, N.Y., of
counsel), for Appellee.

LUMBARD, Circuit Judge:

Sol Klayminc and four confederates appeal their convictions on a jury verdict for criminal contempt under 18 U.S.C. § 401(3) (1982), based upon violations, or the aiding and abetting of violations, of a permanent injunction of the Southern District, filed July 30, 1982, which prohibited infringement of the trademark of Louis Vuitton S.A., the well-known French manufacturer of high fashion handbags and other leather goods. The appellants received sentences ranging from six months to five years. Central to their appeals is the claim that the district court's appointment of Vuitton's attorneys as special prosecutors under Fed. R. Crim. P. 42(b) violated appellants' due process right to a disinterested prosecutor and that the court exceeded its authority by approving the special prosecutors' use of a "sting" operation fashioned along the lines of Abscam.

We find that the district court acted within its discretion in appointing Vuitton's attorneys to prosecute, and that it was within the court's authority to approve a sting operation.

As none of the other claims of error require reversal of any of the convictions, we affirm the judgments of the district court.

Because Judge Brieant has discussed the case extensively in two opinions, United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc., 592 F. Supp. 734 (S.D.N.Y. 1984) ("Vuitton I"), and United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc., 602 F. Supp. 1052 (S.D.N.Y. 1985) ("Vuitton II"), and because we agree with his rulings, we briefly recapitulate the history of Vuitton's efforts to protect its trademark from infringement by counterfeiters.

Vuitton first brought suit in the District Court for the Southern District in December, 1978, against Sol Klayminc and his family-owned businesses, Karen Bags, Inc. and Jade Handbag Co., Inc., alleging that they were manufacturing imitation Vuitton goods for sale and distribution. Vuitton obtained a preliminary injunction the same month. Sol's wife, Sylvia, his son Barry, and Jak Handbag, Inc., another family owned business, were subsequently joined as defendants. Proceedings were then stayed to await the outcome of litigation in the Ninth Circuit regarding the validity of Vuitton's trademark. After the trademark was found valid in Vuitton et Fils S.A. v. J. Young Enterprises, 644 F.2d 769 (9th Cir. 1981), the parties, in July 1982, entered into a settlement agreement pursuant to which the defendants agreed to pay Vuitton \$100,000 in damages. Defendants also consented to the issuance of a permanent injunction which enjoined them from, inter alia, "manufacturing . . . selling, offering for sale . . . any product bearing any simulation . . . of Vuitton's Registered Trade-Mark 297,594."

In early 1983, Vuitton, Gucci Shops, Inc., the manufacturers of Calvin Klein jeans and certain other owners of

prestigious trademarks were contacted by Kanner Security Group, Inc., a Florida investigation firm whose principals are former FBI agents. Kanner proposed a plan to ferret out possible infringers by means of a "sting" operation subsequently dubbed "Bagscam"; the firm was subsequently retained. The main operatives in this sting operation were Melvin Weinberg and Gunner Askeland, a former FBI agent, both of whom had been involved in Abscam. Operating under the supervision of Vuitton attorney J. Joseph Bainton, Weinberg and Askeland posed as purchasers of counterfeit goods (using the assumed names "Mel West" and "Chris Anderson") and in this way they penetrated a network of counterfeiters that included Sol and Barry Klayminc and the other appellants.

Weinberg, posing as "Mel West," had a number of telephone conversations with appellant Nathan Helfand in which Weinberg explained that he and Askeland were interested in buying counterfeit goods. Helfand told Weinberg that he would talk to a man named "Sol" who had been in trouble with Vuitton in the past, but was planning to produce counterfeit Vuitton and Gucci goods in Haiti.

Helfand had a dinner meeting with Sol and Sylvia Klayminc in Florida on March 27, 1983 at which they discussed the sale by Sol of counterfeit Vuitton and Gucci wares and the possible investment by Weinberg and Askeland in the Haitian factory. Sol signed a memorandum describing in detail the present and proposed nature of the operation at the factory and another memorandum detailing the anticipated cost to Weinberg and Askeland of the counterfeited goods. At this meeting Sol also delivered to Helfand some sample counterfeit Vuitton bags for Weinberg's and Askeland's inspection. Sol explained to Helfand that additional imitation Vuitton products purchased from Sol could be picked up from a man

named "George" (appellant George Cariste) in New Jersey. Sol also stated that his son, Barry, had a 25 percent interest in the Haitian operation. From the reported conversations it was apparent that both he and his confederates were aware of the permanent injunction.

On March 31, 1983, Bainton requested the court to appoint him and his associate Robert P. Devlin as special prosecutors in a criminal contempt proceeding pursuant to Fed. R. Crim P. 42(b). Bainton's affidavit recited in detail the developments summarized above, which Helfand had reported to Askeland and Weinberg. Bainton pointed out that both he and Devlin had previously been appointed by the court to prosecute Sol Klayminc for criminal contempt.¹

Judge Lasker, acting in place of Judge Brieant (the assigned judge who was absent), found on the strength of Bainton's affidavit that there was probable cause to believe that the alleged criminal contemnors were knowingly in violation of the court's permanent injunction; he appointed Bainton and Devlin to prosecute the case in an order dated March 31, 1983.

Desiring to see up the case, but concerned about the ethical prohibition against private attorneys making surreptitious recordings, see 20th Century Wear, Inc. v. Sanmark-Stardust, Inc., 747 F.2d 81, 93 n.17 (2d Cir. 1984), cert. denied, 105 S. Ct. 1755 (1985); ABA Comm. on Ethics and Professional Responsibility, Formal

1. Judge Brieant had appointed Bainton and Devlin on July 8, 1981 to prosecute Sol Klayminc and his family-owned businesses for their criminally contumacious conduct in selling counterfeit Vuitton goods in defiance of the court's December 12, 1978 preliminary injunction. The case was tried as a petty offense before a United States Magistrate on July 22, 1982. Klayminc and the corporate defendants were convicted, but the Magistrate suspended the sentences upon hearing that the underlying civil action had been settled.

Op. 337 (1974), Bainton also sought the court's permission to continue the undercover investigation and videotape the results. He detailed in his affidavit the next step in the investigation: a meeting arranged to take place at the Plaza Hotel in New York on April 5, 1983, among Sol, Barry, Askeland, and Weinberg to which Sol had been requested to bring twenty-five counterfeit Vuitton bags. The court's order empowered counsel to undertake "further investigation" of the alleged counterfeiting and to follow through with the activities detailed in Bainton's affidavit.

When Judge Brieant returned, Bainton, on April 6, apprised him of Judge Lasker's order and the continuing investigation. Judge Brieant suggested that Bainton bring the investigation to the attention of the United States Attorney's Office. By letter dated that same day, Bainton informed Lawrence Pedowitz, the Chief of the Criminal Division of the United States Attorney's Office for the Southern District, of the investigation and offered to make any tape recordings or other evidence available to his office.² Pedowitz did not take any action, but simply wished Bainton good luck. Judge Brieant noted that the United States Attorney's Office was again contacted about the case on the eve of trial, but indicated no desire to enter the case.

Thus, approved by court order, "Bagscam" went into full operation. Over the course of a month, numerous video and audio tape recordings were made of meetings and phone calls between appellants and the investigatory team. These recordings later

2. Because the investigation required some undercover work in California, Bainton also contacted John Kildeback of the District Attorney's Office in Los Angeles to discuss the California law applicable to planned electronic eavesdropping by federal agents. Kildeback confirmed that the planned investigatory activities would present no problem under California law.

enabled the jurors to see and hear a graphic account of the meeting at the Hotel Plaza on April 5 and the sale, for \$25.00 apiece, of 25 imitation Vuitton bags to "Mel" by Sol. Mel later put up \$5,000 to help Sol get his Haitian factory going to make more "L's" or "LV's", as the counterfeit bags were known.

Based, in part, on his April 26, 1983 report to Judge Brieant describing the contents of the recordings, Bainton requested, and the judge signed, an Order to Show Cause why the five appellants, as well as several corporate entities and two other individuals, David Rochman and Robert Pariseault, should not be cited for civil and criminal contempt for either violating or aiding and abetting the violation of the July 30, 1982 permanent injunction.

The defendants filed pre-trial motions opposing the Order to Show Cause and the appointment of Bainton and Devlin as special prosecutors. Oral argument was heard October 31, 1983. On April 9, 1984, Judge Brieant denied all the pre-trial motions. Vuitton I, supra. Rochman and Pariseault subsequently entered guilty pleas.

At the jury trial before Judge Brieant in May 1984 the government presented its evidence regarding the tapes and conversations through Weinberg and Rochman. Weinberg was extensively cross-examined for three days.

The defense presented no testimony contradicting any of the events detailed in the videotapes and in Weinberg's testimony. Sol Klayminc, Barry Klayminc, Nathan Helfand and Gerald Young did not take the stand. The only defendant who testified was George Cariste, who claimed that he had no knowledge of the court's injunction.

Following their convictions by the jury, defendants submitted post-trial motions. On January 24, 1985, Judge Brieant denied the motions. Vuitton II, supra.

Defendants claim on appeal that the special appointment of Bainton and Devlin violated their due process right to an impartial prosecutor. As a fallback, they contend that even if a court can appoint an interested attorney to prosecute a criminal contempt, the court does not have the power to invest that attorney with extraordinary investigative privileges. Appellants maintain that such privileges should be reserved for, and supervised by, experienced and accountable law enforcement authorities, not subject to abuse by private parties who seek to enhance their positions in related civil actions. To illustrate their concerns, appellants argue that Weinberg received sketchy instructions on how to conduct the "sting", that Weinberg both misrepresented the terms of the injunction to appellants and created ambiguities in the evidence, and that he asked numerous extraneous questions relevant not to the criminal contempt but to two civil proceedings: a \$2.25 million defamation action by Sol Klayminc against Bainton and his law firm and Vuitton's challenge to Sol Klayminc's discharge of debts in voluntary bankruptcy.

Appellants' first argument founders on our decision in Musidor, B.V. v. Great American Screen, 658 F.2d 60 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982) where we held that it was proper for the district court to appoint as special prosecutor the counsel for civil plaintiffs in the copyright litigation that had resulted in the injunction allegedly violated. Appellants urge us to overrule Musidor. We decline to do so. The practice of appointing such counsel as prosecutor has a long history in this circuit. The

attorney will usually be the court's only source of information about contempts occurring outside the court's presence. See McCann v. New York Stock Exchange, 80 F.2d 211, 214 (2d Cir. 1935), cert. denied, 299 U.S. 603 (1936). Counsel for the plaintiffs are already fully informed and ready to go forward without delay. The district court is already aware of their competence and can make further inquiry if needed. Here, the qualifications of Bainton and Devlin were obvious and known to the court.

Appellants contend that in Musidor we did not fully appreciate the importance of the defendant's right to a disinterested prosecutor. The Musidor court, however, appropriately recognized that that right is not absolute. Although a prosecutor is charged with the duty not to win but to seek justice, Berger v. United States, 295 U.S. 78, 88 (1935), he hardly comes to the prosecution with an open mind. As we stated in Wright v. United States, 732 F.2d 1048 (2d Cir. 1984), cert. denied, 105 S. Ct. 779 (1985) "If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply interested in urging that view by any fair means. True disinterest on the issue of such a defendant's guilt is the domain of the judge and the jury -- not the prosecutor." Id. at 1056 (citation omitted). The possibility that impermissible personal considerations may influence a prosecutor's decisions does not necessarily deprive a defendant of due process: "The constitutional interests in accurate findings of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor and not the judge, who is offered an incentive for securing civil penalties." Marshall v. Jerrico, Inc., 446 U.S. 238, 248-49 (1980).

We are not persuaded that Bainton and Devlin were disqualified by their past connections with Vuitton's business, their involvement in previous lawsuits with the defendants, or by any of their conduct in this lengthy litigation. The record reveals that the actions they took in the interests of their client and in support of the court's orders were fully justified by what they had discovered regarding the defendant's activities. The fact that Sol Klayminc had brought suit against Bainton in the New York courts alleging harassment and other acts is entitled to no weight as the suit was clearly frivolous; it was never pressed, and was finally dismissed by consent.

Prosecutors appointed under Fed. R. Crim. P. 42(b) are particularly susceptible of judicial control. They are under close judicial scrutiny as was the case here. By the very act of appointing a special prosecutor, the judge plays a key role in the decision about whether to prosecute. Hence, the prime danger that the special prosecutor will use the threat of prosecution as a bargaining chip in civil negotiations is practically nil.

Judge Brieant conducted the proceedings and the trial with a sharp eye toward ensuring that appellants were "accorded all the protections given to other criminal defendants." Vuitton I, 592 F. Supp. at 746. The Order to Show Cause, supported by Bainton's affidavit, gave ample notice that appellants were charged with criminal contempt under 18 U.S.C. § 401(3) because of certain enumerated acts. Appellants had nearly thirteen months to prepare for trial. When they expressed concern that exculpatory Brady material might be within the Bainton/Vuitton attorney-client privilege, Judge Brieant ruled that such material would not be privileged. 592 F. Supp. at 746-47.

We are not persuaded by the recent opinion of the Sixth Circuit in Polo Fashions, Inc. v. Stock Buyers International, Inc., 760 F.2d 698 (6th Cir. 1985). That court held that it is an abuse of discretion for a district court to appoint an attorney for a party in an underlying civil case as the sole or primary prosecutor in a related criminal contempt proceeding. The court emphasized that its holding was based on its supervisory authority over the Sixth Circuit. The court expressly did not decide that the appointment of an interested prosecutor in a criminal contempt proceeding violates the due process clause.

The government's case, relying as it did principally on tape recordings of what the defendants said and did, was so strong and convincing that the defendants can say little or nothing about the evidence except to complain that the court must not soil itself by approving the use of evidence obtained by deceit and misrepresentation. Defendants also argue that although such evidence might be received if it has been developed under the supervision of some government prosecutor, it ought not to be received where appointed counsel acts as the prosecutor. Laying aside the obvious rejoinder that it ill becomes defendants who have shown so little regard for the majesty of the law and the orders of a federal court to be concerned about such matters, we find this argument to be completely without merit.

The special prosecutor should have the same power to gather evidence and present that evidence to the court as does any other government prosecutor. Appellants fail to cite any cases in which Rule 42 has been construed to limit the powers of the special prosecutor in this regard. In the absence of legislative history or some compelling reason that supports appellants' argument, we

decline to draw a distinction between the United States Attorney and the court appointed prosecutor that is not contemplated by the literal language of Rule 42. The Rule's use of the term "to prosecute" applies to both types of government prosecutors mentioned therein and the common sense meaning of the term clearly encompasses the power to investigate and gather evidence through activities such as the Bagscam sting supervised by Bainton and Devlin.

Moreover, the district court was fully familiar with the use of evidence obtained through sting operations by virtue of this court's scrutiny and use of evidence similarly obtained in the Weinberg-managed "Abscam" sting. We affirmed convictions based on such evidence in United States v. Myers, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983). See also United States v. Kelly, 707 F.2d 1460 (D.C. Cir.), cert. denied, 104 S. Ct. 264 (1983); United States v. Williams, 705 F.2d 603 (2d Cir.), cert. denied, 104 S. Ct. 524, 525 (1983); United States v. Jannotti, 673 F.2d 578 (3d Cir.), cert. denied, 457 U.S. 1106 (1982). Nor is there any reason to believe that counsel who acted for the government in this case and who supervised the sting operation under the eye of the court and with its approval, did anything unethical or in violation of the Canons of Ethics. We therefore reject appellants' objections to the appointment of the special prosecutors and their supervision of the investigation.

Each of the appellants also challenges the sufficiency of the evidence supporting his conviction. We reject these challenges. Sol Klayminc obviously knew of the injunction since he consented to it. His conduct in selling the 25 counterfeit bags to Weinberg at the Plaza Hotel, as well as his offering to sell in the

United States counterfeit bags manufactured in Haiti, clearly violated the injunction.

The four other appellants were tried and convicted of willfully aiding and abetting Sol Klayminc's violation of the injunction. See 18 U.S.C. § 2(a)(1982). There is no doubt as to Barry Klayminc's knowledge of the injunction; Barry alleges, instead, that Judge Brieant incorrectly charged the jury on the standard for aiding and abetting and that, in any event, there was insufficient evidence of acts on his part aiding and abetting his father's violation of the injunction.

Conviction for aiding and abetting requires participation in an actual violation of the injunction, not just a plan to violate it. Barry argues that Judge Brieant erred in instructing the jury that it could convict defendants for aiding and abetting if, among other things, the jury found that defendants "did something . . . in furtherance of a . . . scheme or plan to violate the injunction order." Barry has unduly focused on one line of a long charge which accurately and completely informed the jury.

Because the scope of the injunction is very broad and prohibits even offers to sell counterfeit Vuitton goods, the jury could reasonably have found that Barry participated in actual violations of the injunction. Cariste testified that he and Barry met with Askeland and Weinberg on April 19, 1983 to discuss a plan to offer counterfeit Vuitton bags for sale in the United States. Later, Barry telephoned Cariste to request that he cut patterns for the Vuitton dies. Barry also aided his father's attempts to secure Weinberg as a buyer of imitation Vuitton goods by assuring Weinberg that Barry would take over for Sol if Sol became unable to manage the Haitian factory.

There was no reason for Judge Brieant to charge the jury, as Barry argues, that the injunction prohibited only contractual offers to provide counterfeit Vuitton goods. In the absence of any indication that the injunction intended anything but the commonly understood meaning of the term "offer", the judge's failure to give the requested instruction was not error.

There was also ample evidence to support the other convictions. Young had a longstanding relationship with Sol Klayminc and his statement that "if [Klayminc] would have listened to me, he wouldn't have had those troubles" (Tape 2, April 14, 1983) supports the inference that Young knew of the injunction. Young also argues that Judge Brieant erred in admitting, under the co-conspirator exception to the hearsay rule, evidence of a telephone conversation between Weinberg and Sol Klayminc in which Klayminc discussed Young's involvement in civil litigation with Vuitton in California. We think that the evidence was properly admitted as Young's prior experience with Vuitton litigation was relevant to the question of his knowledge of Klayminc's injunction. Nor may Young complain that the judge failed to instruct the jury of Young's ultimate "withdrawal" from the Haitian counterfeiting project. Even if we accept Young's assertion that he withdrew, this would not be a defense because the purported withdrawal took place after Young had committed the various acts of contempt for which he was convicted.

That Cariste had knowledge of the injunction is supported by Cariste's close association with Sol Klayminc at the time the injunction was entered in 1982 and by the trial testimony of Weinberg and David Rochman. Weinberg testified that Cariste had told him that Klayminc sold his Vuitton dies to Cariste when

Klayminc first got in trouble with Vuitton. Rochman testified that Cariste had mentioned the injunction at an April 12, 1983 meeting. Cariste participated in meetings with Askeland and Weinberg at which the parties discussed the manufacturing of counterfeit Vuitton goods and it was Cariste who supplied the 25 imitation bags to Sol for sale at the April 5, 1983 meeting at the Plaza Hotel.

Helfand was a close associate of Sol Klayminc, and he knew that Klayminc had had trouble with Vuitton in the past. Rochman testified that in the first week of April, 1983 he and Helfand discussed Sol Klayminc's counterfeiting operation and the fact that Klayminc was at that time under an injunction prohibiting him from infringing Vuitton's trademark. In light of the evidence of Helfand's knowledge of the injunction and of his activities as go-between for Weinberg and Sol Klayminc, there was ample evidence to support his conviction.

Finally, each appellant challenges the propriety of the sentence imposed on him. The primary contention here is that Judge Brieant relied upon an improper consideration -- the vindication of Vuitton's property rights -- in passing sentence. While the fundamental consideration in punishing criminal contempt is protecting the court's authority, it is also appropriate for a court to consider both the consequences of the violation of the injunctions and the importance of deterring such acts in the future. See United States v. United Mine Workers of America, 330 U.S. 258, 303 (1947). The sentences imposed by the judge reflect a range of punishment that comports with each defendant's culpability. In light of the defendants' deliberate flaunting of the law over an extended period of time and in light of their calculated acts in violation of the court's injunction, the

sentences are not excessive.

We have considered the other arguments raised by the appellants and find them to be without merit.

Judgments affirmed.

Vuitton et Fils S.A. v. Klayminc, 85-1068 et al.

OAKES, Circuit Judge (dissenting)

I am required to dissent.

In my mind, the most difficult question that this case presents is whether it is legitimate for a court in the exercise of its criminal contempt powers to place its imprimatur on a sting operation that has already begun under the supervision of private attorneys and that will continue to run without effective judicial oversight. In the court below, Judge Brieant found that Judge Lasker's earlier approval of such an operation was appropriate and also saw no reason why it should matter whether an investigation occurs before or after the court appoints a special prosecutor, so long as the investigation proceeds with respect for defendants' constitutional rights. United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc., 592 F. Supp. 734, 743 (S.D.N.Y. 1984) (Vuitton I); see also United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc., 602 F. Supp. 1052, 1055-56 (S.D.N.Y. 1985) (Vuitton II). I see the issue as slightly more complicated. I believe the timing of the appointment and the extent of judicial oversight are of critical importance. Moreover, I believe that there are compelling reasons against court approval of such an operation: the private lawyer who participates in a sting operation almost necessarily runs afoul of the canons of legal ethics; the private lawyer who represents an interested party also lacks the knowledge of legal constraints on the investigatorial process and freedom from bias that a public prosecutor would have. A court should approve a sting operation only when it has determined that there is a strong showing that a court order has been violated and where there is no other way of catching the contemners. Such approval should also be conditioned on observance of strict guidelines.

Judge Lasker's decision to authorize further investigation on the part of Vuitton is certainly understandable. This court had already held that in criminal contempt proceedings counsel for interested parties may in appropriate circumstances be appointed special prosecutors. See Musidor, B.V. v. Great American Screen, 658 F.2d 60 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982). Moreover, Sol Klayminc had previously violated a court order barring him from counterfeiting Vuitton goods. Nonetheless, attorneys for Vuitton should not have been vested with the investigatory powers of prosecutions. As indicated above, a number of factors must be balanced against the interest in catching contemners, and, in this case, those factors should have been found to be predominant.

Thus, in a situation such as this, the court should have considered the possibility that Vuitton's campaign against would-be counterfeiters would not be thwarted by denying its attorneys sweeping investigatory powers. First, other methods of investigation would remain open. For instance, in Musidor, 658 F.2d 60, the key testimony came from a private investigator who never practiced any deception: he conducted surveillance, trailed a van, and purchased one of the items bearing the protected trademark from the back of the van. Second, a company like Vuitton, that has proved over and over again just what kind of counterfeiters it is up against, see In re Vuitton et Fils S.A., 606 F.2d 1, 2 (2d Cir. 1979), could conceivably obtain judicial authorization before beginning the sting, although several cases and commentators have advanced the convincing contention that sting operations may be justified only to combat activities threatening "grave harm to our society," such as the corruption of public officials. United States v. Kelly, 707 F.2d 1460, 1473 (D.C. Cir.), cert. denied, 474

U.S. 908 (1983); see also United States v. Myers, 692 F.2d 823, 843 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983); Blecker, Beyond 1984: Undercover in America -- Serpico to Abscam, 28 N.Y.L. Sch. L. Rev. 823, 975-82 (1984).¹

Another factor to be considered in a case such as this is whether the court should refuse to approve an ongoing investigation in which lawyers may have previously violated ethical norms (as it appears, concededly in hindsight, Vuitton's lawyers did here). A lawyer has the general duty not to "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Model Code of Professional Responsibility DR 1-102(A)(4) (1980); see also Model Rules of Professional Conduct Rule 8.4(c) (1983). He also has the specific duty not to "knowingly make a false statement of law or fact." Model Code DR 7-102(A)(5); see also Model Rule 4.1(a). These duties of lawyers exist even when the lawyers are not acting in their capacity as such. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 336 (1974) (duties of lawyers in respect to Watergate activities). In the words of Justice Frankfurter,

It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield," to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."

1. I note that after the order issued in this case, remedies against counterfeiters were unquestionably strengthened by the Trademark Counterfeiting Act of 1984. Pub. L. No. 98-473, §§ 1501-1503, 98 Stat. 2178 (codified at 15 U.S.C.A. §§ 1116-1118, 18 U.S.C.A. § 2320 (West Supp. 1985)). In future cases, this law must be taken into account in considering the alternate remedies available to trademark holders.

Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1957)

(Frankfurter, J., concurring). I believe that the duty to refrain from conduct that involves dishonesty, fraud, deceit, or misrepresentation and the duty to speak the truth should preclude a private attorney from participating in a sting operation without first receiving court approval. Moreover, those fundamental tenets of the legal profession mandate that such approval be granted rarely and only under exceptional circumstances.

Nor is it available to argue that the chicanery here was performed by an investigative firm rather than by counsel themselves. As attorney Bainton's affidavit in support of his motion seeking appointment as a special prosecutor and judicial approval of the investigation makes clear, these operations were conducted with his knowledge and approval. In addition, there is some suggestion in the record that the course of conduct by the Kanner security firm was not only ratified by Vuitton's counsel, but that it was in part directed by them. In either case, attorneys who employ such a firm must be held to bear responsibility for the firm's use of techniques that would be ethical violations if utilized by the attorneys directly. Lawyers cannot escape responsibility for the wrongdoing they supervise or ratify by asserting that it was their agents, not themselves, who committed the wrong. The history of Watergate eloquently demonstrates that lawyers have the capacity to perpetrate lawlessness by directing the behavior of others; the conviction of certain of Watergate's lawyer-defendants, see, e.g., United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976) ("plumbers" break-in at Ellsberg's psychiatrist's office), cert. denied, 429 U.S. 1120 (1977); United States v. Liddy, 509 F.2d 428 (D.C. Cir. 1974) (original Watergate break-in and wiretapping), cert. denied, 420

U.S. 911 (1975), evidences the fact that the lawyer who guides others into or profits by illicit behavior bears responsibility for acts done under his supervision. Such responsibility accords with agency law. See Restatement (Second) of Agency § 217D (1957) (principal may be subject to penalties for criminal acts of agents). It accords with the canons of legal ethics. See Model Rule 5.3 (lawyer responsible for the misconduct of nonlawyer employees or associates if the lawyer orders or ratifies the conduct); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1320 (1975) (deeming it unethical for lawyer to have his investigator tape colloquy with sales clerk without clerk's knowledge). Most basically, it accords with the obligations and duties of lawyers in our society.

In reviewing Vuitton's attorney's application for approval of the investigation, the court should also have considered the possibility of imposing guidelines for and limitations on that investigation. If such an operation is to be approved, guidelines are necessary. Respect for the court, the end goal of contempt, may be diminished when a court approves an open-ended investigation by attorneys unrestrained by either institutional guidelines or the court's own specific guidance. The Rule 42 order read in part (emphasis added): "ORDERED that J. Joseph Bainton, Esq., and Robert P. Devlin, Esq., . . . are hereby specially appointed to represent the United States of America in connection with the further investigation of the alleged aforesaid criminally contumacious course of conduct and the ultimate prosecution therefor" Obviously, such a broad order must be construed to permit only lawful investigations, and I will assume that Bainton and Devlin so understood it. See Vuitton I, 592 F. Supp. at 743. Indeed, the attorneys, to their credit,

anxious to remain within the bounds of California law, did secure the supervision of the Los Angeles District Attorney over their electronic eavesdropping in California. But a lawful investigation may still fall far short of the careful investigation a judge would or should approve in advance; once the evidence is in, courts have a "well-established reluctance to dismiss criminal prosecutions because of faulty Government investigation." United States v. Myers, 692 F.2d at 843. The standard appropriate in reviewing a completed investigation is not, however, the appropriate one for a court to use when it approves an investigation in advance. In the latter situation, there is no reason for the court not to require that the investigation be conducted with the utmost scrupulousness and respect for individual rights.

There are, however, I hasten to add, certain inherent problems with the decision to authorize an investigation conducted by attorneys for private parties. When there is a history of bitter litigation between the parties under investigation and the clients of the attorneys conducting the investigation, as there is in this case, a certain amount of animus against those being investigated on the part of the attorneys is all but inevitable. At the same time, those attorneys will frequently lack knowledge of all the limits that our laws require prosecutors to observe. Through inclination and ignorance, as well as lack of responsibility to the public, to higher authorities or to an electorate, or a combination of these, private attorneys are likely to fail to exhibit the self-restraint in conducting an investigation and the candor in admitting errors that are required of prosecutors and are of critical importance if our system is to work properly. Indeed, just such an argument was utilized in Judge Lumbard's and my recent RICO opinion in Sedima, S.P.R.L. v. Imrex

Co., 741 F.2d 482, 497 (1984), reversed on other grounds, 105 S. Ct. 3275 (1985). Attorney Bainton's affidavit in support of his motion seeking judicial approval of the investigation illustrates the problems with placing too great a faith in interested private attorneys. That affidavit clearly indicates that the court order barring counterfeiters was being violated. My reading of the record indicates instead that the defendants here had probably not violated the earlier order at that time and that the investigation may have been the proximate cause of the violation. Hindsight at least demonstrates the need for caution.

In the end, I am concerned not so much by this case -- much less by these defendants' plights -- as by the thought that courts may put their stamps of approval on whatever undercover tactics lawyers or their hired investigators may devise short of the outrageous or illegal. Authorizing the nearly-outrageous and barely legal can hardly be said in the long run to preserve the dignity of the courts or secure their position of respect.

It is my belief, therefore, that the decision authorizing Bainton and Devlin to continue their investigation was incorrect. Accordingly, I would reverse the judgment.

Vuitton et Fils S.A. v.
Klayminc, 85-1068

UNITED STATES of America, ex rel., VUITTON ET FILS S.A., and Louis Vuitton S.A., Plaintiffs,

v.

KAREN BAGS, INC., Jade Handbag Co., Inc., Sol N. Klayminc and Jak Handbag Inc., Defendants and Alleged Criminal Contemnors,

and

Barry Dean Klayminc, Gerald J. Young, George Cariste, S.M.E., S.A., Crystal, S.A., David Rochman, Robert G. Pariseault, Esq. and Nathan Helfand, Additional Alleged Criminal Contemnors.

No. 83 Cr. Misc. 1, p. 22-CLB.

United States District Court,
S.D. New York

Jan. 24, 1985.

J. Joseph Bainton, New York City, Specially Appointed, for U.S.

Reboul, MacMurray, Hewitt, Maynard & Kristol, New York City, for plaintiffs.

William Weininger, Samuel & Weininger, New York City, for defendant Sol Klayminc.

James A. Cohen, Washington Square Legal Services, Inc., New York City, for defendant Barry Klayminc.

Leonard Comden, Wasserman, Comden & Casselman, Encino, Cal., for defendant Gerald Young.

Mitchell B. Craner, New York City, for defendant Nathan Helfand.

Thomas Matarazzo, Brooklyn, N.Y., for defendant Nathan Helfand.

MEMORANDUM AND ORDER

BRIEANT, District Judge.

As is set forth more fully in this Court's Memorandum Decision and Order dated April 9, 1984, United States v. Karen Bags, Inc., 592 F.Supp. 734 (S.D.N.Y.1984) (Hereinafter "Prior Order"), familiarity with which is assumed, these criminal cases arise out of

the sales of counterfeit Louis Vuitton products and the campaign waged by Vuitton et Fils S.A. ("Vuitton") to protect its trademark and profits. On July 22, 1982, Sol Klayminc was sentenced before Magistrate Bernikow in this district, for criminal contempt, a crime based on Sol Klayminc's continuing to sell, or offer for sale, counterfeits in violation of an injunction issued in December 1978. As part of the settlement agreement in an underlying civil action, Vuitton et Fils S.A. v. Karen Bags, Inc., et al. (78 Civ. 5863), Sol Klayminc, his wife Sylvia, his son Barry, and the family-owned corporate defendants agreed to entry of a permanent injunction, which was then issued on consent by Judge Lowe of this court on July 30, 1982. Undeterred, Sol Klayminc again became a criminal defendant charged with disobeying the July 1982 injunction.

After conducting a civil investigation, and concluding that wrongdoing by the Klaymins and others had continued (Affidavit of J. Joseph Bainton, Esq., sworn to March 30, 1983), attorneys for Vuitton sought permission to investigate and prosecute the defendants named herein for their allegedly criminal acts in violation of the July 1982 injunction. 18 U.S.C. § 401(3). On March 31, 1983, Judge Lasker granted attorney Bainton's application to be appointed Special Prosecutor. Rule 42(b), F.R.Crim.P. The criminal actions proceeded, step by step, to trial by jury.¹

This Court conducted a nine-day trial which concluded on May 24, 1984. The trial jury returned verdicts of guilty against defendants Sol Klayminc, Barry Klayminc, Gerald Young, George Cariste, and Nathan Helfand. All of these defendants now move the Court to set

1. It should be noted that the recently enacted Comprehensive Crime Control Act of 1984, P.L. No. 98-473 (October 12, 1984), makes intentional trafficking in counterfeit goods following its enactment, a crime punishable by fine and imprisonment up to five years. 18 U.S.C. § 2320.

aside the verdicts, Rule 29(c), F.R.Crim.P., to dismiss the Order to Show Cause under which the United States initially accused the defendants of criminal contempt, and/or to order a new trial. Barry Klayminc and Nathan Helfand also move for a "due process" hearing. The Court will treat separately the various challenges to the convictions obtained by the Government's Special Prosecutor.

Due Process

Barry Klayminc and other defendants who are deemed to have joined in his motion argue that the prosecution of these cases violated defendants' due process rights under the Fifth Amendment to the United States Constitution. The grounds for this argument include (1) erroneous appointment of Vuitton's private attorney as a special prosecutor; (2) outrageous conduct by government agents; (3) excessive and improperly supervised investigative techniques; and (4) "targeting" of defendants who were "urged" to violate the law.

(Defendant Barry Klayminc's Memorandum of Law, filed August 3, 1984; Defendant Gerald Young's Memorandum of Law, filed August 1, 1984).

Many of defendants' due process claims were presented to the Court in pre-trial motions and have been addressed in the Court's Prior Order, 592 F.Supp. at 740-49. Nevertheless, counsel for Barry Klayminc has insisted by motion and by letters received as recently as December 10, 1984, that the "sting" operation conducted by the Special Prosecutor is marred by unconstitutional features.

Defendants' first contention, concerning the propriety of the appointment pursuant to Rule 42(b), F.R.Crim.P., is discussed fully in the Prior Order. The appointment was authorized under the principles enunciated in Musidor B.V. v. Great American Screen, 658 F.2d 60 (2d Cir.1981), cert. denied, 455 U.S. 944, 102 S.Ct. 1440, 71 L.Ed.2d 656 (1982). Once the appointment was approved by Judge Lasker, and upheld as lawful in this Court's Prior Order, no purpose

is served for defendant Klayminc to continue to state that "it was actually a private party that conducted the sting. The fact that it was a private party that conducted the operation and not the government, while it goes a long way toward explaining the shortcomings of the investigation, at the same time makes those shortcomings [sic] more offensive and less tolerable." (Defendant Barry Klayminc's Memorandum of Law, filed August 3, 1984 at 25). There is no merit to this argument. It was not a private party conducting the sting; it was a specially appointed prosecutor acting on behalf of the United States.

Contrary to defendants' view, this Court is not persuaded that any new information has been discovered at or after trial that impugns the integrity of the Special Prosecutor or highlights any alleged conflict of interest rendering the appointment invalid. Barry Klayminc points to tape-recorded conversations between the government agent (Mel Weinberg, of Abscam fame) and the defendants which display an "unseemly curiosity" regarding the defamation action filed by Sol Klayminc in state court against attorney Bainton. In addition Barry Klayminc points to similar conversations in which the pending bankruptcy concerning Debtor Sol Klayminc is discussed. These conversations, it is argued, reveal abuses by the Special Prosecutor who utilized the government investigation to advance his own interests and the interests of his private client, Vuitton.

Taken in proportion to the whole of the extensive tape recordings made during the sting, the conversations to which defendants object are no more and no less than portions of a continuing Runyonesque dialogue between the undercover agent and the defendants. There is no basis for inferring that Bainton was using the government investigation "to seek out and attempt to eliminate personal enemies." Records in the Supreme Court of the State of New

York, County of New York reveal that although Sol Klayminc did begin a defamation action against Bainton (by serving a summons and complaint in December 1982), that action was never pursued in any fashion and was eventually closed by the filing of a stipulation of discontinuance in July 1984. The Court declines to find that the defamation suit would motivate the Special Prosecutor to engage in misconduct or that it did. See Prior Order, 592 F.Supp. at 746.

Likewise, the bankruptcy action in which Vuitton opposed the discharge of Sol Klayminc, did not create such a conflict of interest that would rise to the level of a due process violation. Simply because Vuitton's civil proceedings to recover damages and lost profits coincided with the criminal investigation does not require that the Special Prosecutor be disqualified. The taped conversations concerning the bankruptcy do not provide a basis for finding the "demonstrable level of outrageousness" of the sort discussed in Hampton v. United States, 425 U.S. 484, 495, n. 7, 96 S.Ct. 1646, 1653, n. 7, 48 L.Ed.2d 113 (1976) (Powell, J. concurring). Even assuming that the taped conversations did concern subjects not relevant to the purpose of the undercover operation, as did much of Weinberg's conversational play acting, the standards for reversing a conviction or for dismissal of the charging instrument require much more offensive instances of prosecutorial misconduct than are alleged here. See Wright v. United States, 732 F.2d 1048, 1055-58 (2d Cir.1984).

The remaining arguments underlying defendants' due process claim involve subjects somewhat related to prosecutorial conflict of interest. These arguments concern the propriety of the government agents' conduct and whether the agents acted without proper governmental supervision. Defendants contend that the unsupervised nature of the investigation resulted in ambiguous and unreliable

evidence which was presented to the trier of fact.

One of the agents employed by the Special Prosecutor was Melvin Weinberg. Video and audio tapes of meetings and conversations between Weinberg and the various defendants formed the bulk of the government's evidence at trial. In his petition for a post-trial evidentiary hearing, defendant Barry Klayminc questions (1) the extent to which the government initiated rather than detected criminal activity; (2) the excessiveness of the sting; and (3) the lack of procedural safeguards in the investigative techniques. Barry Klayminc undoubtedly is correct when he states that: "But for the actions of Mel Weinberg, and those behind them, there would be no issue before the court today." The difficulty with defendant's position, however, is that he must distinguish between infiltration by an undercover agent which constitutes "effective law enforcement work," United States v. Corcione, 592 F.2d 111, 115 (2d Cir.), cert. denied, 440 U.S. 985, 99 S.Ct. 1801, 60 L.Ed.2d 248 (1979), and governmental conduct which "creates a substantial risk that the 'guilty' verdict is not a reliable evaluation of what a defendant did." United States v. Myers, 527 F.Supp. 1206, 1229 (E.D.N.Y.1981), aff'd in part, 692 F.2d 823 (2d Cir.1982), cert. denied, 461 U.S. 961, 103 S.Ct. 2437, 77 L.Ed.2d 1322 (1983).

It is indisputable that Mel Weinberg is a "con man," that he has a prior criminal record, and that he used his amazing skills at role playing, deception and trickery during the course of these undercover operations. Weinberg's unsavory past and his skills aforementioned do not disqualify him from employment as a government agent; in fact, they give Weinberg the ability to dissimulate and pretend convincingly, and to succeed at his role as an undercover informant or creator of a sting. Myers, 527 F.Supp. at 1239. The Court has reviewed trial transcripts as well as tape transcripts

attached as exhibits to the parties' post-trial briefs and finds that none of Weinberg's conduct constitutes unconstitutional, outrageous government conduct of the sort that would justify setting aside a jury verdict on the ground that due process has been denied. Nor is Weinberg's credibility or lack thereof a serious issue in the case. In truth, defendants were for the most part convicted out of their own mouths, not Weinberg's.

Although a small number of convictions have been overturned on due process grounds relating to overinvolvement by government agents, United States v. Lard, 734 F.2d 1290 (8th Cir.1984); United States v. Twigg, 588 F.2d 373 (3d Cir.1978); Greene v. United States, 454 F.2d 783 (9th Cir.1971); United States v. Valdovinos-Valdovinas, No. CR-83-0711, slip op. (N.D.Cal. Feb. 15, 1984), rev'd on other grounds, 743 F.2d 1436 (9th Cir.1984), and although the Supreme Court has suggested that due process standards might bar convictions in a case of intolerable, outrageous government conduct, Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), far more frequently convictions have been upheld despite arguments from the defendants that their due process rights were violated by outrageous government conduct. See e.g., United States v. Myers, supra; United States v. Duggan, 743 F.2d 59 (2d Cir.1984); United States v. Dyman, 739 F.2d 762 (2d Cir.1984); United States v. Toner, 728 F.2d 115 (2d Cir.1984); United States v. Silvestri, 719 F.2d 577 (2d Cir.1983) (Abscam); United States v. Romano, 706 F.2d 370 (2d Cir.1983); United States v. Williams, 705 F.2d 603 (2d Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 524, 525, 78 L.Ed.2d 708 (1983) (Abscam); United States v. Carpentier, 689 F.2d 21 (2d Cir.1982), cert. denied, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 957 (1983) (Abscam); United States v. Alexandro, 675 F.2d 34 (2d Cir.), cert.

denied, 459 U.S. 835, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982) (Abscam); Archer v. Commissioner of Correction of the State of New York, 646 F.2d 44 (2d Cir.), cert. denied, 454 U.S. 851, 102 S.Ct. 291, 70 L.Ed.2d 141 (1981); United States v. Nunez-Rios, 622 F.2d 1093 (2d Cir.1980); United States v. Corcione, 592 F.2d 111 (2d Cir.), cert. denied, 440 U.S. 985, 99 S.Ct. 1801, 60 L.Ed.2d 248 (1979).

Whether the instant convictions must be overturned depends on the facts and the degree of outrageousness. In the case at bar, Weinberg did "string along" the defendants through the use of lies and false pretenses, money and similar encouragement. It is permissible for agents to infiltrate and participate in illegal enterprises for the purpose of obtaining evidence, United States v. Russell, 411 U.S. 423, 432, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973), and the agents' conduct is not outrageous "merely because the agents did not cease their efforts immediately upon [defendant's] initial proclamation of honesty." Myers, 527 F.Supp. at 1231. According to the dissent in Hampton, intolerable outrageousness, either on a due process or some other theory, would be reached where the "Government's agent deliberately sets up the accused by supplying him with contraband and then bringing him to another agent as a potential purchaser . . ." of that contraband, thereby in effect creating the crime. 425 U.S. at 498, 96 S.Ct. at 1654 (Brennan, J., dissenting). The instant case did not involve that sort of outrageousness. Weinberg did not supply counterfeits.

Furthermore, whatever claim of constitutional violation may have been founded upon Weinberg's statements that the Vuitton counterfeits to be made in the Republic of Haiti were not going to be sold in the United States and that it was not a crime to manufacture the Vuitton trademarked goods outside of the territorial United States was cured by the Court's charge to the jury. As an abstract matter,

the extra-territorial manufacture and distribution of the counterfeits by Sol Klayminc, or aiding and abetting him to do so, would violate the July 1982 injunction. See Steele v. Bulova Watch Co., 344 U.S. 280, 73 S.Ct. 252, 97 L.Ed. 252 (1952); Blackmer v. United States, 284 U.S. 421, 52 S.Ct. 252, 76 L.Ed. 375 (1932). However, in the interests of fairness, and because Weinberg, posing as Mel West, had told Sol Klayminc that such conduct would be legal, this Court instructed the jury that:

"Before you may conclude that a defendant whose case you are considering undertook some act in violation of the injunction, you must find that in addition to satisfying its burden of proof as to the elements of contempt that I have already discussed, the government has also proved beyond a reasonable doubt that it was intended that the offering or the manufacture, assembly, sale or other distribution of counterfeit handbags either did take place or was to take place wholly or partly in the United States. Much of the evidence presented in this trial has concerned activities that occurred or are alleged to have occurred in Haiti. I instruct you that the manufacture of counterfeit handbags in Haiti and the sale or distribution of those handbags in Haiti or Europe or anywhere else in the world entirely outside of the United States would not violate the injunction. So if you find that a plan or scheme for the manufacture and sale of counterfeit Vuitton bags existed but that those activities were to be conducted only outside the United States, with the sale or other distribution of counterfeit bags taking place only outside the United States, you may not find that any act in furtherance of that scheme violated this Court's order. Accordingly, any defendant who participated in a plan or scheme and did some activity in furtherance of it to sell or otherwise distribute or manufacture entirely outside the United States would not be in contempt of the injunction and such a person should be found not guilty. However, if you find that it was understood and intended by the person whose case you are then considering that counterfeit handbags would be distributed or sold either wholly or partly in the United States and that the defendant whose case you are then considering undertook some overt act in furtherance of the plan to manufacture or distribute fake handbags in the United States, then you may find that that defendant violated the Court's injunctive order. In other words, members of the jury, in order to find a defendant guilty of contempt you must find beyond a reasonable doubt either that he participated in or aided and abetted

a violation of the injunction here in the United States or in a scheme to manufacture or distribute counterfeit handbags made in Haiti to be sold, imported, distributed, either wholly or partly, within the United States." (Trial Transcript, pp. 962-64).

We believe that this instruction neutralized any prejudice suffered by any defendant who may have relied on the aforementioned advice on the part of Weinberg which we assume for the argument may be characterized as outrageous. This instruction assured that the jury based its verdict upon reliable evidence of commission of the crime of contempt in the United States, and not in Haiti.

Finally, no matter what Melvin Weinberg did or did not say or do, he could not force Sol Klayminc to bring twenty-five counterfeit Vuitton bags to the Plaza Hotel in New York City, as he did, and exchange them for Six Hundred Twenty-five Dollars in cash, as he did. (Tape 6A, April 5, 1983). This was as clear an example of a criminal contempt as could be imagined.

In the same vein, the Court finds that the evidence received by the jury was not rendered unreliable due to any governmental misconduct. The defendants argue that the investigation produced ambiguous evidence, especially on the issue of intent, and that these ambiguities by their very existence transgress due process limits. To the extent this argument addresses the weight or reliability of evidence, it presents a jury question. The jury viewed and heard taped meetings between Weinberg and defendants, some more than once. This does much to negate claims that the events and evidence were ambiguous. The video and audio tapes speak for themselves, and vividly. They are more reliable than testimony by any eye witness who attempts to recreate an event after it has occurred. Myers, 527 F.Supp. at 1229-30. During the taped conversations, it was permissible for the government's agent to simulate the guarded conversations that are generally expected in proposals by the minions

of organized crime to engage others to assist in unlawful activities. Myers, 692 F.2d at 843-44. Furthermore, the issue of intent always requires the jury to draw inferences and to make decisions about the meaning of a person's words and conduct. The strength of the overwhelming evidence in this case obviates any apprehension that the government's investigation created the risk that the jury verdicts were not based upon reliable fact-finding.

For example, Sol Klayminc's own statements form a basis for inferring that he knew that further counterfeiting would constitute a crime:

SOL KLAYMINC: "Okay now, I need to protect myself against these people [Vuitton] because you know I had a to-do with them several times. I got to make sure that I don't expose myself to them again because it would be a criminal action." (Tape 6A, April 5, 1983).

* * * * *

And he did it anyway:

WEINBERG: "Order the LV's, just the LV's [Vuitton goods]. The hell with this other for a while. Let's get them out.

SOL KLAYMINC: . . . All right. So now I spoke to this guy George and I gave him the order to start, three hundred satchels and a hundred shopping bags and a hundred cosmetic cases." (Tape 6B, April 5, 1983).

The operations of George [Cariste] were located in the United States and so known to be by Sol Klayminc at the time. Additionally, Sol Klayminc's own statements form an adequate basis to support the jury's finding that Sol Klayminc intended to distribute counterfeit Vuitton products within the territorial United States:

WEINBERG: "How long do you think that the L.V.'s will still be popular in this country?

SOL KLAYMINC: It could be good for another five years . . .

* * * * *

SOL KLAYMINC: Yeah, there's a big market out there, a tremendous market. (Tape 1, April 1, 1983).

* * * * *

WEINBERG: We'll bring it in with our planes. There'll be no Customs or nothing.

SOL KLAYMINC: Wow, that's great." (Tape 2, April 4, 1983).

Furthermore, the jury was entitled to believe Weinberg's trial testimony:

(cross-examination by Mr. Weininger, Attorney for Sol Klayminc).

"Q [Mr. Weininger]: And that had nothing to do with Klayminc's operation in Haiti?

A [Mel Weinberg]: Sure it did. The bags are supposed to come into the states." (Trial Tr. p. 201).

The government introduced similar evidence of joint activity among the defendants. Without providing further examples of relevant evidence, a subject more fully discussed below in the Court's treatment of defendants' challenges to the sufficiency of the evidence, the Court finds that there was no impairment of accurate fact-finding, and that none of the challenged convictions should be set aside on the ground that defendants' constitutional rights were denied by reason of a faulty or poorly supervised government sting operation.

Turning to the motions for a post-trial evidentiary hearing, the Court concludes that this request also should be denied. The demand for a hearing is based upon the following theories and offers of proof: (1) that the 45 minute gap occurring on a tape recording of April 21, 1983 raises a strong inference of tampering by the government; (2) that the CBS Sixty Minutes program entitled "Sting Man Stings Again" and aired on October 21, 1984 provides new information concerning threats made by the government agent; (3) that defendant Nathan Helfand's testimony at such a hearing would establish that Weinberg was the one who initially asked Helfand whether he knew Sol Klayminc and that this testimony would establish improper targeting; and, in general (4) that defendants are in need of another opportunity to present evidence of outrageous government conduct.

Even if such a hearing were held, and defendants were able to prove these contentions, the Court is unable to conclude that these

specific events mentioned would violate constitutional due process standards.

According to a letter from James A. Cohen, attorney for Barry Klayminc, dated November 12, 1984, a due process hearing is necessary in order to give the Special Prosecutor an opportunity to explain the condition of the blank video tape which was introduced into evidence at trial (Gov't. Ex. 109). The blank video tape was an attempted recording of an April 19, 1983 meeting at the Plaza Hotel attended by Barry Klayminc, George Cariste and Melvin Weinberg. As part of defendant Barry Klayminc's post-trial requests, granted by this Court at the hearing of October 5, 1984, Mr. Cohen deposed the operator of the video equipment, Sgt. Michael Harvey, who is a California law enforcement officer. The Court has reviewed the typed transcript of this telephone conference call deposition. The transcript establishes that the technical supervisor, Sgt. Harvey, has no explanation for the failure of the recording device. From this fact, counsel for Barry Klayminc leaps to the conclusion that the Special Prosecutor must have tampered with the tape while the tape was in his custody:

"From our conversation with Mr. Harvey, it is clear that the problem did not occur at the time of the recording, since the tape has been (presumably) in the exclusive possession of the prosecutor or his agents; an inference that the agents/government tampered with the tape is irresistible. Since the inference raised is so strong, and since the due process concerns involving both the quality and method of the prosecution's investigation and the possible withholding of Brady material available on the tape are currently before the court, a hearing should be held to develop this issue i.e., the special prosecutor should be given an opportunity to explain the condition of the tape." (Letter of James A. Cohen, dated November 12, 1984).

It is unclear what evidence Mr. Cohen would expect to uncover at an evidentiary hearing on the subject of the blank video tape. The tape operator has already been deposed; the Special

Prosecutor has already stated his position that the government knows of no explanation for the failure of the recording. (Hearing Transcript, October 5, 1984, p. 34; letter of J. Joseph Bainton, Esq., dated November 29, 1984). The trial jury was aware that the tape equipment had failed (Trial Tr., pp. 172-73, 465-71) and could have chosen to disbelieve Melvin Weinberg's uncorroborated account of the meeting. Finally, it is unclear how the tape could have contained undisclosed Brady material since the defendant himself was present at the meeting which the government attempted to videotape. See United States v. Robinson, 560 F.2d 507, 518 (2d Cir.1977), cert. denied, 435 U.S. 905, 98 S.Ct. 1451, 55 L.Ed.2d 496 (1978).

Defendant Barry Klayminc has not referred to any unrecorded portions of the conversation with Weinberg that would have added to, his defense. The tape equipment failure, in short, does not support an inference of due process violations on the part of the prosecution, and no hearing is necessary to elicit repetitious statements by the Special Prosecutor or Sgt. Harvey. These insinuations do not amount to sufficient evidence of tampering, to trigger a hearing. There is no duty to make recordings of criminal activity. United States v. Weisz, 718 F.2d 413, 435-37 (D.C.Cir.1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1285, 1305, 79 L.Ed.2d 688 (1984).

Turning to the alleged new information revealed during the Sixty Minutes television interview with Melvin Weinberg, defendants' due process theory here too fails to necessitate an additional evidentiary hearing. The so-called new information is not very new. It is the revelation that Weinberg made threats to Barry Klayminc during the course of the "sting" operation. On Sixty Minutes, Weinberg and Mike Wallace, host and interviewer, engaged in the following dialogue:

"MR. WALLACE: Well, why did you make a death threat to Barry Klayminc?

MR. WEINBERG: I made -- I didn't believe it was actually a death threat. I told him I'd break his head open if he keeps starting rumors.

MR. WALLACE: You didn't say to him, 'You wouldn't want your parents to have only one child left?' -- and he had a sister.

MR. WEINBERG: I may have said that to him there. I was trying to tell him to get off our back, 'cause he was going up telling the father we weren't for real.' (Transcript of CBS News, October 21, 1984, p. 11, annexed to Gov't Memorandum in Opposition, dated November 29, 1984).

At trial, Weinberg testified (Cross-examination by Mr. Cohen):

Q: Did you ever say 'I will cut the cocksuckers throat, he will have a real scar?'

A: If it is in the tape, I said it.

* * * * *

Q: Did you ever say, 'Yeah, I got it out of the kid, and I said next time you open your fuckin' mouth is going to be the last time?'

A: If it is on the tape, I said it." (Trial Tr. pp. 344-46).

Upon a comparison of Weinberg's post-trial statements to a CBS journalist, and the statements Weinberg made on tapes introduced at trial, as well as his cross-examination testimony quoted above, the Court cannot find that the more recently admitted threats are different in degree or content from the threats exposed during trial. While the Court does not applaud the fact that undercover agents, if convincing, must "do and say things that are generally deplored in more civilized parts of our society," United States v. McQuin, 612 F.2d 1193, 1196 (9th Cir.), cert. denied, 445 U.S. 955, 100 S.Ct. 2608, 63 L.Ed.2d 791 (1980), the fact remains that an undercover agent often is playing the role of a hood, a criminal, a person with a reputation for violence and deceit. It is possible for a defendant to build a successful defense of entrapment or duress based upon such an agent's threatening and despicable conduct; however, the instant request is different, and not based on entrapment or duress. As is made clear by Mr. Cohen's letter dated December 10, 1984, defendant Barry Klayminc's motion is based upon the theory that Weinberg's total conduct, including his "death threats," was so outrageous that the

Court should find as a matter of law that the defendant suffered denial of his constitutional right to due process. This the Court declines to do.

Mr. Weinberg's "threats," considered separately or in context with his role as a self-proclaimed gangster, are not instances of actual coercion which left Barry or Sol Klayminc with no alternative but to continue participating in the criminal enterprise. Neither Weinberg's threats nor the Special Prosecutor's knowledge of Weinberg's tactics create the kind of government involvement that shocks our universal sense of justice, Kinsella v. United States, 361 U.S. 234, 246, 80 S.Ct. 297, 303, 4 L.Ed.2d 268 (1960), or the kind of conduct "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction. . . ." United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-43, 36 L.Ed.2d 366 (1973).

It is the Supreme Court's opinion in Russell and the separate opinions in Hampton that provide the foundation for defendants' due process theory for post-trial relief. Those opinions discussed the distinction between the due process claim and the entrapment claim, and, in Russell, the Court stated that the entrapment claim is not of constitutional dimension. 411 U.S. at 433, 93 S.Ct. at 1643. In view of the fact that the trial jury was instructed on the issue of entrapment (Trial Tr. pp. 967-71) and chose to convict the defendants despite their assertions, it would be error for the Court to permit the factual issue of entrapment to re-emerge following the jury verdict, re-stated as a constitutional due process argument entitled to succeed as a matter of law. The jury has already considered the interactions among Weinberg and the various contemnors, and the possibility that the defendants had no previous intent to violate the law but were victims of entrapment. A successful post-

trial due process challenge would have to be based upon facts other than those essential to the entrapment claim, already rejected by our jury, and none have been presented.

As to the proffered testimony by defendant Nathan Helfand, even if it were established that during Weinberg's fourth meeting with Mr. Helfand, Weinberg asked Helfand whether he knew Sol Klayminc and requested Helfand to contact Sol Klayminc (Joint Letter of James A. Cohen, Esq. and Thomas Matarazzo, Esq. dated November 28, 1984), this fact does not "clearly demonstrate that the Klaymincs were improperly targeted." (Id.).

The Myers district court addressed the issue of targeting in the Abscam "stings" and concluded that the prosecution needed no "probable cause" or even "reasonable suspicion" as a constitutional predicate to offering bribes to the defendant congressmen. 527 F.Supp. at 1226; accord, United States v. Myers, 635 F.2d 932, 940-41 (2d Cir.), cert. denied, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980); United States v. Jannotti, 673 F.2d 578, 609 (3d Cir.), cert. denied, 457 U.S. 1106, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982). A fortiori, it can be no different for a handbag manufacturer with one prior conviction. The proffered testimony does not necessitate a due process hearing.

Sufficiency of the Evidence

Defendants Sol Klayminc, Barry Klayminc, George Cariste, Nathan Helfand and Gerald Young have moved for a judgement of acquittal pursuant to Rule 29(c), F.R.Crim.P. The memoranda in support of these motions focus upon different aspects of the evidence, but, in general, they assert that the government failed in its proof.

"The standard to be applied by a trial court confronted with a motion for a judgment of acquittal was set forth in United States v. Taylor, 464 F.2d 240, 243 (2d Cir.1972), quoting Curley v. United States, 81 U.S.App.D.C. 389, 392, 160 F.2d 229, 232 (D.C.Cir.), cert. denied, 331 U.S. 837, 67 S.Ct.

1511, 91 L.Ed. 1850 (1947).

'The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.
(footnotes omitted).'

Furthermore, '[i]t is axiomatic on motion for acquittal that all reasonable inferences are to be resolved in favor of the prosecution and the trial court is required to view the evidence in the light most favorable to the Government with respect to each element of the offense.' United States v. Skinner, 138 U.S.App.D.C. 121, 123, 425 F.2d 552, 554 (D.C.Cir.1970)."

United States v. Artuso, 618 F.2d 192, 195 (2d Cir.1980), cert. denied, 449 U.S. 879, 101 S.Ct. 226, 66 L.Ed.2d 102 (1981). It is axiomatic furthermore that the trial judge cannot substitute his judgment for that of the jury, and is not "entitled to set aside the guilty verdict simply because he would have reached a different result if he had been the fact-finder." United States v. Cunningham, 723 F.2d 217, 232 (2d Cir.1983), cert. denied --- U.S. ---, 104 S.Ct. 2154, 80 L.Ed.2d 540 (1984).

Applying these principles to Sol Klayminc, his Rule 29 motion must be denied. It is indisputable that Sol Klayminc had knowledge of the 1982 injunction since he consented to its entry. It is indisputable that Sol Klayminc had awareness of the criminal nature of acts violating the 1982 injunction since he had already been convicted of criminal contempt before Magistrate Bernikow of this Court. As to the requisite criminal intent, counsel for Sol Klayminc

argues that Sol repeatedly expressed his desire to avoid any plans involving manufacture or distribution of Vuitton bags in the United States, and that these expressions negate the jury finding of guilty intent to violate the terms of the injunction. (Notice of Motion, dated August 3, 1984, pp. 4-14). In an effort to counter the evidence that Sol Klayminc sold 25 bags to Mel Weinberg at the Plaza Hotel in New York City, counsel for Sol Klayminc asks the Court "to view this exchange in the context of what the Prosecution knew about Mr. Klayminc's state of mind, that is his concern about not violating the Court Order." (*Id.* at 14).

The Court is certain that Sol Klayminc must have been "concerned" about not violating the injunction. However, his "concern" changes neither what he said and did, nor the reasonable inferences to be drawn therefrom. The Court cannot find that "there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States v. Taylor, supra.*

The jury heard Sol Klayminc on audiotape exchange 25 counterfeit bags for cash within the territorial United States, evidence that was corroborated copiously by other recordings in which Sol Klayminc provided the jury with reasons to find that he intended that the counterfeits be offered for sale within the United States. Two samples are illustrative:

"MR. MEL WEINBERG: All right? That these guys know they're dealing with me, to give us the material.

MR. SOL N. KLAYMINC: Oh yeah. Yeah.

MR. MEL WEINBERG: And then your son could stay in Haiti with you. I don't want you to come back to the States. You run your business. We'll take care of everything else here.

MR. SOL N. KLAYMINC: Okay, fine.

MR. MEL WEINBERG: We'll bring it in with our planes. We'll pick it up directly from him.

MR. SOL N. KLAYMINC: Beautiful.

MR. MEL WEINBERG: Bring it in with our planes. There'll be no Customs or nothing.

(Tape 2, April 4, 1983).

* * * * *

MR. SOL KLAYMINC: Yeah, Okay, now what's happening

with the L's [Louis Vuitton's] now. You -- we're going ahead with the 500. Now, I was speaking to Nat [Nathan Helfand], he said you wanted 2,500.

MR. MEL WEINBERG: No, no. I -- I got -- I need 5,000 L's.

MR. SOL KLAYMINC: L's?

MR. MEL WEINBERG: Yeah.

MR. SOL N. KLAYMINC: How long do you want to give me?

MR. MEL WEINBERG: Well . . .

MR. SOL N. KLAYMINC: You give me by the end of the month I'll get it for you.

MR. MEL WEINBERG: By the end of the month?

MR. SOL N. KLAYMINC: Well, it'll -- if you get half in the next couple of weeks, will that hold you off for awhile?

MR. MEL WEINBERG: Well, how many can George [Cariste] come up with?

MR. SOL N. KLAYMINC: I want George to cut for me and send it to Haiti. I could start making them there. He'll make half, I'll make half. Between the two of us we could knock you off the five [thousand] within a month.

* * * * *

MR. SOL N. KLAYMINC: And then the fact that we send back legitimate stuff, I'll be making legitimate stuff, so that could go back in lieu. Now, we're going to send it through our name, my name.

MR. MEL WEINBERG: Right.

MR. SOL N. KLAYMINC: So now the other stuff I'll make and I'll send back and that'll be like, you know, the Customs I don't think they check what kind of stuff that you're sending.

MR. MEL WEINBERG: No, they don't check.

MR. SOL N. KLAYMINC: Right. So this way I send back legitimate goods and it covers the shipment."

(Tape 19, April 9, 1983).

These and other tape recordings, along with the trial testimony, amply support the jury verdict against Sol Klayminc. In addition, Government's Ex. 169, a written sales proposal by Helfand and Sol Klayminc to Mel West (Mel Weinberg's alias) contained reference to deliveries of fake Vuitton goods in New York or New Jersey. Sol Klayminc's actions -- selling the twenty-five bags at the Plaza Hotel, agreeing to manufacture fake Vuitton bags at his factory in Haiti for shipment to the United States, accepting money from Weinberg to purchase machinery, engaging in numerous meetings and conversations to further the manufacturing and distribution scheme, introducing Weinberg to Gerald Young in order to obtain counterfeit

Vuitton-like fabric -- each of these acts could have supported the jury's conclusion that Sol Klayminc wilfully and intentionally disobeyed the 1982 court order by offering counterfeit Vuitton merchandise for sale in the United States.

The guilty verdicts against the four other contemporaries also withstand their Rule 29 motions. Cariste, Helfand, Young and Barry Klayminc were tried and convicted on the theory that they knowingly and wilfully aided and abetted Sol Klayminc's commission of the substantive offense of criminal contempt. 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal"). The elements necessary to prove aiding and abetting are "the commission of the underlying offense by someone, a voluntary act or omission, and a specific intent that such act or omission promote the success of the underlying criminal offense." United States v. Perry, 643 F.2d 38, 46 (2d Cir.), cert. denied, 454 U.S. 835, 102 S.Ct. 138, 70 L.Ed.2d 115 (1981).

The standard of proof as articulated by Judge Learned Hand, United States v. Peoni, 100 F.2d 401, 402 (2d Cir.1938), and currently applied in this Circuit, United States v. Clemente, 640 F.2d 1069, 1079 (2d Cir.1981), demands that a defendant must "in some sort associate himself with the venture . . . participate in it as something that he wishes to bring about, [and] seek by his action to make it succeed." As explained in United States v. Beck, 615 F.2d 441 (7th Cir.1980), the standard for aiding and abetting has two prongs -- association and participation; that is, intent plus some overt act designed to aid in the success of the venture.

In contending that the government's proof failed to satisfy these legal standards, defendant Nathan Helfand argues that there was inadequate evidence to establish that Helfand had knowledge of the

existence of the permanent injunction. Helfand need not have been served personally with a copy of the injunction in order to have had "knowledge" of what the order prohibited. Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 129 (2d Cir.1979); Rule 65(d), F.R.Civ.P. (an injunction is binding upon those persons . . . "who receive actual notice of the order by personal service or otherwise") (emphasis added).

The evidence on this point included testimony by David Rochman that he received a telephone call from Helfand during the first week of April, 1983. Rochman testified that during this phone call, Helfand stated that he was involved with a large organization, together with Sol Klayminc who was "a very knowledgeable man in the business [counterfeiting], that he'd been doing this kind of thing for many years, that he had some problems with the Vuitton people, had been sued a few times and was under an injunction now." (Trial Tr. 503-04). The jury also heard evidence that Helfand and Sol Klayminc had known one another for a long time. This is an adequate basis for the jury to conclude that Helfand acted with knowledge of the 1982 injunction. As for overt acts, it was Helfand who helped to arrange the April 5, 1983 meeting between Sol Klayminc and Melvin Weinberg at the Plaza Hotel. This act took place simultaneously with or immediately after Helfand's statement to Rochman that he knew about the injunction. Nor did Helfand drop out of the planning activities after the first week of April. Weinberg testified that "Helfand was calling me approximately every day" during the middle of April, 1983. (Trial T. 117-18). There was sufficient evidence to prove that Helfand was not a passive bystander, but rather, an active participant in the substantive commission of knowing and wilful violations of the 1982 injunction.

Similarly, defendants George Cariste and Gerald Young

voluntarily associated themselves with Sol Klayminc with the specific intent to aid in the success of the manufacturing and distribution scheme. Cariste himself supplied the twenty-five counterfeit bags to Sol Klayminc for the April 5, 1983 sale at the Plaza Hotel. Cariste testified at trial that he had no actual knowledge of the injunction at the time that he dealt in the counterfeits. Apparently the jury disbelieved him. That does not create grounds for a judgment of acquittal under the exacting standard of "no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

The jury heard evidence that Cariste had known Sol Klayminc in 1982 when Karen Bags, Inc. went out of business and that Cariste obtained Sol Klayminc's dies used in manufacturing counterfeit Vuittons. The jury also heard David Rochman testify that Cariste told Rochman on April 12, 1983 that he knew about Sol Klayminc's "problems with an injunction." (Trial Tr. 507). During April, 1983, and after April 12, 1983, George Cariste committed several overt acts from which the jury could conclude that he specifically intended to promote the venture, including his attendance and participation at the meeting of April 19, 1983 at the Plaza Hotel with Barry Klayminc, Gunnar Askelund (a Vuitton undercover investigator) and Mel Weinberg. Cariste testified that before this meeting he had delivered fifty counterfeit Vuitton bags to a location in New York City, knowing that the bags were for use in Sol Klayminc's Haitian factory. He also testified that he went to the April 19, 1983 meeting which was set up because "Mel" was looking for a manufacturer of fake Vuittons in the United States. (Trial Tr. 684-86). Clearly the jury could find that George Cariste had knowledge of the injunction and nevertheless chose to participate actively in the offer for sale of counterfeit Louis Vuitton products.

Contemnor Gerald Young was videotaped on April 14, 1983 at a meeting at the Beverly Wilshire Hotel in Los Angeles. On the videotape, received in evidence and played for the jury, Young promises Mel Weinberg that he will supply counterfeit Vuitton fabric. The fabric was to be produced in Japan and then delivered in the United States via Young's contact in Hong Kong. The fabric would be in a roll having ten yards or so of "innocuous" fabric at its tail, so as to conceal the imitation Vuitton material. In addition, Young made arrangements to meet Gunnar Askelund at a California bank in order to open a joint account for funds to be used in obtaining the fabric. Young and Askelund signed bank signature cards for this purpose.

The jury fairly could have concluded that these and other overt acts were committed by Young while he had knowledge of the 1982 injunction. The government established, through credible evidence, that Young and Sol Klayminc had a longstanding relationship; and, again, Young's own statements revealed an awareness of the court order.

"MR. GERALD YOUNG: I understand what you're saying.
MR. MEL WEINBERG: This guy has got a million dollars worth of troubles.
MR. GERALD YOUNG: Sol?
MR. MEL WEINBERG: Yeah.
MR. GERALD YOUNG: He got two million dollars worth. If he would have listened to me, he wouldn't have had those troubles.
MR. MEL WEINBERG: Hey, second guessing --
MR. GERALD YOUNG: Yeah. Hindsight is 20/20, right?
MR. MEL WEINBERG: I mean the guy -- the guy got caught." (Tape 2, April 14, 1983).

Taken in view of the totality of the evidence, the jury could have found this and other statements to be a valid basis for inferring knowledge and wilfullness on the part of Young.

Because Barry Klayminc, like Sol Klayminc, consented to the entry of the 1982 injunction, there can be no doubt that he was aware of the prohibition against dealing in counterfeit Vuitton goods. It was stipulated at trial that knowledge is not a disputed issue in the

case against Barry Klayminc. Instead, this defendant bases his rule 29 motion largely on the argument that the evidence failed to prove a volitional, completed act by Barry Klayminc which would constitute criminal contempt. Defendant argues that Barry's role was limited to "discussions" about the bag scheme, and that Barry's statements either concerned past acts or were expressions of future intent. If this were true, the Court would find that the second prong of the test for aiding and abetting had not been satisfied and that the verdict could not stand because the jury could not have found the requisite participation by Barry. However, the facts in evidence support the jury's conclusion that Barry did more than just talk.

The most significant act by Barry Klayminc in furtherance of an intentional plan to offer counterfeit bags for sale in the United States was his attendance at an April 19, 1983 meeting at the Plaza Hotel with Mel Weinberg and George Cariste. Cariste testified that Barry had telephoned Cariste to arrange the meeting. (Trial Tr. 684-85). Barry met George Cariste in the lobby of Barry's apartment building and then escorted him to the hotel and called the room registered to "Mel West." After having several drinks in the hotel bar, Barry and Cariste went upstairs where Barry introduced Cariste to Weinberg. (Trial Tr. 169-73, 686-89). Later Barry telephoned Cariste to request that he cut patterns for the Vuitton dies. (Trial Tr. 692).

In addition the jury heard taped conversations between Barry and Weinberg. In one such conversation, Barry refers to a trip to New Jersey to make a "pick-up" from Cariste:

"MR. BARRY KLAYMINC: He also mentioned to me that, you know, when we want to make that pickup that I'll go along with your men or whatever, you know, with the --
MR. MEL WEINBERG: Oh, yeah, that's what I want to go over with you. All right.
MR. BARRY KLAYMINC: Yeah, no problem with that.
MR. MEL WEINBERG: All right, well, then we go to

George's and make the pickup, all right?

MR. BARRY KLAYMINC: Right.

MR. MEL WEINBERG: He knows I would go with you. I'll send one of my drivers with the cash.

MR. BARRY KLAYMINC: Okay. No problem.

MR. MEL WEINBERG: Well, probably it's for your protection too.

MR. BARRY KLAYMINC: Right.

MR. MEL WEINBERG: All right? And then they'll take it and they'll go right to the plane. We'll have a lane at the airport.

MR. BARRY KLAYMINC: Fine. No problem.

MR. MEL WEINBERG: All right? Where? We got to go to Jersey?

MR. BARRY KLAYMINC: Yeah, yeah, he's out in Jersey. I don't have his address here. I'll get that from my father.

MR. MEL WEINBERG: Oh. I mean, is the place a safe place, though?

MR. BARRY KLAYMINC: What's that?

MR. MEL WEINBERG: Well, where they're going, is it a safe place? To his house or factory, or what?

MR. BARRY KLAYMINC: I'm pretty sure, you know, it's a factory, but as far as I know' it's safe. I mean' there's never been any screw-ups before' so --

MR. MEL WEINBERG: All right --

MR. BARRY KLAYMINC: -- you know --

MR. MEL WEINBERG: -- that's all. I don't want to get you involved with it' you know.

MR. BARRY KLAYMINC: No, there won't be any trouble. I, mean, you know, this guy's, you know' he's a good man, and you know, there really won't be any problem." (Tape 30, April 12, 1983).

In another conversation, Barry discusses the possibility of manufacturing counterfeit Vuitton goods inside the territorial United States. It will be remembered that the "LV" mark is imprinted directly in the fabric itself, so that merely producing the material is itself an act of infringement:

"MR. MEL WEINBERG: We may be able to buy, we're working on a deal to buy a factory to produce our own material.

MR. BARRY KLAYMINC: Oh really?

MR. MEL WEINBERG: Yeah.

MR. BARRY KLAYMINC: That would be, that would be super.

* * * * *

MR. MEL WEINBERG: So, we should be and we may buy another factory up in the, in the states.

MR. BARRY KLAYMINC: Right.

MR. MEL WEINBERG: And if we do, one of the things we're going to do is put you in to help run it.

MR. BARRY KLAYMINC: Okay, I, you mean to produce the product or just the fabric?

MR. MEL WEINBERG: No, no. We got, we'll have the

fabric produced, all right?

MR. BARRY KLAYMINC: Right.

MR. MEL WEINBERG: And then to produce the product, we'll put you in 'cause you know the L.V.'s and all. Now, pop says George has got the dies for, of his?

MR. BARRY KLAYMINC: Yeah, he should have just about all the dies.

MR. MEL WEINBERG: But George has got 'em?

MR. BARRY KLAYMINC: Yeah." (Tape 40, April 17, 1983).

In yet another taped dialogue, Barry Klayminc told Weinberg about his intimate familiarity with the counterfeiting business, and assured Weinberg that he could take over for Sol Klayminc in the event that Sol became unable to manage the Haitian factory:

*MR. MEL WEINBERG: Any of the stuff for the Louis Vuitton there?

MR. BARRY KLAYMINC: What?

MR. MEL WEINBERG: Any of the stuff for the Pocketbooks--?

MR. BARRY KLAYMINC: Well, the machinery, of course, will be used for that, but the leather is that softer leather, you know, we used, you know, for those other bags. But you know, the other machinery we definitely can use, you know, for the L. [Louis Vuitton] program.

MR. MEL WEINBERG: All right, now, long as I got you one the phone, all right--?

MR. BARRY KLAYMINC: Yeah.

MR. MEL WEINBERG: --you're going to be working for Pop, right?

MR. BARRY KLAYMINC: Yeah, sure.

MR. MEL WEINBERG: All right, what is your capacity? You know, we get to know each other.

MR. BARRY KLAYMINC: As far as what?

MR. MEL WEINBERG: Well, what did you do before for Pop?

MR. BARRY KLAYMINC: Oh well, like, everything from fixing machines to working with the biggest buyers, I mean, you know, selling-wise. I mean, I ran the whole gamut. I started out, you know, literally sweeping the floors, and you know, I was -- you know, supervised, worked on machines, fixed machines, went out selling -- you know, the whole deal. So there's no part of the business I don't know -- put it that way.

MR. MEL WEINBERG: Now, are you able to take over for us and make the L's [Louis Vuitton's] down in Haiti?

MR. BARRY KLAYMINC: Oh, no problem.

MR. MEL WEINBERG: All right, and you know all about how to make 'em?

MR. BARRY KLAYMINC: Oh, yeah.

MR. MEL WEINBERG: And you did it up here?

MR. BARRY KLAYMINC: Oh, yeah.

MR. MEL WEINBERG: Oh, you did it up here, so you

know about 'em.

MR. BARRY KLAYMINC: Yeah, no problem.

MR. MEL WEINBERG: All right, 'cause I didn't know that you did it up here or not.

MR. BARRY KLAYMINC: In fact, you know, comes out I'll look forward to doing the cutting and stuff on that, 'cause you know I used to get a little enjoyment out of, you know, getting the best, you know, out of it that you could, you know, the best yield, if you know what I'm saying, and oh yeah, you know, I mean, I'm definitely fully versed on, you know, the whole operation and, you know, how everything goes.

* * * * *

MR. MEL WEINBERG: --I'd like to meet you. But I mean, what I'm worried about is that anything happens to Pop, you know what to do, where to order, get the stuff, and--

MR. BARRY KLAYMINC: Right. Oh, no, no, I mean, you know, God forbid, of course, if that would ever happen, I mean, I'd fill right in, and I mean, I'd jump right in. I mean, I'm -- you know, you're not talking to a greenhorn here.

MR. MEL WEINBERG: All right, you know, I mean, the main thing is that you know how to make the L's [Louis Vuitton] that you did before.

MR. BARRY KLAYMINC: Yeah, definitely, definitely." (Tape 30, April 12, 1983).

Mindful of the requirement that the evidence be weighed as a whole rather than as individual facts in isolation, United States v. Wright, 588 F.2d 31, 34 (2d Cir. 1978), cert. denied, 440 U.S. 917, 99 S.Ct. 1236, 59 L.Ed.2d 467 (1979), we believe that the jury reasonably could have found that Barry Klayminc actively participated in an intentional plan to violate the court's injunction. Having established that Sol Klayminc specifically intended to distribute the counterfeits in the United States, the Special Prosecutor advanced proof that Barry Klayminc knowingly and wilfully committed acts to aid Sol Klayminc in the overall scheme to manufacture bags in Haiti for the purpose of selling them in the United States, Europe and elsewhere. Barry Klayminc was not merely present; he voluntarily attended incriminating meetings to which he brought another person, and he discussed specific, purposeful details concerning the logistics of the unlawful plan. These acts and discussions, viewed as a whole, are steps promoting the success of the venture, a venture in which

Barry stood to make money. Accordingly, we cannot find that Barry's role was passive or limited to ambiguous conversations. The jury was fully instructed as to the elements of aiding and abetting as well as to the meaning of specific intent. We assume that the jury followed these instructions, United States v. Hillard, 701 F.2d 1052, 1059 (2d Cir.), cert. denied, 461 U.S. 958, 103 S.Ct. 2431, 77 L.Ed.2d 1318 (1983), and that they properly found Barry Klayminc guilty of criminal contempt.

All of the defendants' motions are denied. The parties and counsel shall appear before this Court on March 1, 1985 at 2:00 P.M. for imposition of sentence.

So ordered.

UNITED STATES of America, ex rel. VUITTON ET FILS S.A., and Louis
Vuitton S.A., Plaintiffs,

v.

KAREN BAGS, INC., Jade Handbag Co., Inc., Sol N. Klayminc and Jak
Handbag Inc., Defendants and Alleged Criminal Contemnors,

and

Barry Dean Klayminc, Gerald J. Young, George Cariste, S.M.E., S.A.,
Crystal, S.A., David Rochman, Robert G. Pariseault, Esq. and Nathan
Helfand, Additional Alleged Criminal Contemnors.

No. 83 Cr. Misc. 1, p. 22-CLB.

United States District Court,
S.D. New York.

April 9, 1984.

J. Joseph Bainton, Robert P. Devlin, Specially Appointed
Attys. (Reboul, MacMurray, Hewitt, Maynard & Kristol, New York City),
for United States.

William P. Weininger, Samuel & Weininger, New York City, for
defendant Sol Kla' inc.

James A. Cohen, Washington Square Legal Services, Inc., New
York City, for defendant Barry Klayminc.

Leonard Comden, Wasserman, Comden & Casselman, Encino, Cal.,
for defendant Gerald J. Young.

Mitchell B. Craner, Guazzo, Silagi, Craner & Perelson, P.C.,
New York City, for defendant George Cariste.

Charles J. Rogers, Jr., Providence, R.I., for defendant
Robert G. Pariseault.

Thomas R. Matarazzo, Brooklyn, N.Y., for defendant Nathan
Helfand.

Allen B. Bickart, Phoenix, Ariz., for defendant David
Rochman.

MEMORANDUM AND ORDER

BRIEANT, District Judge.

Increasingly in recent years, amid considerable evidence
that the production and distribution of counterfeit apparel,

accessories and novelty gifts, ranging from "E.T." jewelry to "Grateful Dead" T-Shirts, has reached epic proportions, owners of trademarks and licenses in these items have fought back, bringing numerous suits to restrain the marketing of counterfeit goods. One of the more active litigants in this respect has been Vuitton et Fils S.A., which is well known as a leading manufacturer of haute couture leather goods. In order to protect its trademark and profits from retailers of bogus handbags and related items, Vuitton has brought upwards of 80 suits in this Circuit alone. See Matter of Vuitton et Fils, S.A., 606 F.2d 1 (2d Cir.1979).

The criminal contempt proceedings challenged in this case arise out of one such effort by Vuitton -- a civil action commenced in December, 1978 entitled Vuitton et Fils, S.A. v. Karen Bags, Inc., et al., 78 Civ. 5863. In that action, the complainant sought injunctive relief and damages for trademark infringement and unfair competition allegedly committed by several defendants, including Sol Klayminc, Jade Handbag Co., Inc. ("Jade"), and Karen Bags, Inc. ("Karen"). Shortly after the complaint was filed, the defendants consented to the entry of a preliminary injunction and further proceedings were stayed pending resolution in another court of the validity of the disputed trademark.

After determining, in July 1981, the alleged criminal contemnor Sol Klayminc, his wife Sylvia, and the family-owned companies Jade and Karen were continuing to sell counterfeit Vuitton products in violation of the injunction issued in December, 1978, Vuitton made an ex parte request for an order directing Klayminc and several others to show cause why they should not be cited for civil and criminal contempt. Vuitton also moved to have its own attorney, Joseph Bainton, appointed to prosecute the alleged criminal contempt

on behalf of the United States. Both applications were granted by Order dated July 8, 1981. The Court subsequently directed that the criminal contempt be referred to a United States Magistrate for trial as a petty offense. At the conclusion of a trial held before Magistrate Leonard A. Bernikow, Sol Klayminc and the corporate defendants Jade and Karen were convicted of criminal contempt.

The underlying civil action was disposed of through a settlement agreement dated July 13, 1982 which provided that the aforementioned criminal contemnors, as well as Sylvia Klayminc, the Klayminc's son Barry, and another Klayminc company, Jak Handbag, Inc. would pay Vuitton \$100,000.00 plus interest over a specified period. The Klaymincs and the affiliated firms agreed to the issuance of the permanent injunction sought in the complaint. The permanent injunction was entered by Judge Lowe of this Court on July 30, 1982 and provided, in part, that the defendants refrain from producing, distributing or simulating goods in violation of Vuitton trademarks. Subsequently, the Magistrate, having been apprised of the terms of the civil settlement, sentenced Sol Klayminc to one year of probation for his criminal contempt conviction.

According to an affidavit filed in conjunction with the motion for the order to show cause which is at issue here, during the early part of 1983, Vuitton, along with the owners of certain other well known apparel and luggage trademarks, was contacted by a Florida investigation firm and invited to participate in and pay for a "sting" operation. Essentially, the sting involved employees of the security firm posing as merchants interested in buying and selling counterfeit trademarked wares on a large scale. Two of the operatives who undertook prominent roles in the subsequent operation of the sting were a former FBI agent, Gunnar Askeland, and Melvin Weinberg, who had

also participated in the so-called "Abscam" operation of recent memory.

During the course of the investigation, alleged criminal contemnor Nathan Helfand, who had arranged for Weinberg and Askeland to purchase counterfeit trademarked goods, brought to their attention an individual named Sol (allegedly Sol Klayminc) who told Helfand that he had been "burned" by Vuitton "to the tune of \$100,000," and that notwithstanding this undoubtedly unpleasant experience, he was still in the business of marketing counterfeit Vuitton wares.

Encouraged by Askeland and Weinberg, Helfand entered into further discussions with "Sol" regarding the marketing of counterfeit Vuitton and Gucci wares. During the course of these discussions, Sol allegedly told Helfand that Vuitton products could be obtained from a man in New Jersey named "George." Based upon other information, Vuitton believed George to be alleged criminal contemnor George Cariste, who previously had evidently been identified to Vuitton as a primary supplier of counterfeit Vuitton merchandise.

In an affidavit sworn to on March 30, 1983, Mr. Bainton advised the Court in detail about the alleged instances of wrongdoing which its civil investigation had uncovered, and requested that he and another attorney, Robert P. Devlin, be specially appointed to represent the Government in connection with the prosecution of the criminally contumacious conduct and "to continue the investigation and, in due course, the prosecution of what appears to be a massive international conspiracy to violate this Court's permanent injunction." Bainton's application was accompanied by several exhibits which appeared to support his allegations against several of the accused. In addition, Bainton, correctly observing that an attorney specially appointed to represent the Government in a criminal

contempt proceeding "stands in somewhat different shoes than a United States attorney," outlined some of the steps that he would take in further investigating and prosecuting the alleged contempt if his application was granted:

"On the assumption that this application would be granted, preliminary arrangements have been made for a meeting among Sol, Barry, Askeland, and Weinberg at the Plaza Hotel in New York City, at noon on Tuesday, April 5, 1983 In a technical fashion similar to that employed in the Abscam operation, the meeting among those individuals will be video-taped so that at some later time there can be no question as to what was said to whom and by whom. We expect that Sol will repeat the highly incriminatory statements he made last week at dinner with Helfand and on other occasions over the telephone to Helfand Sol has also been requested to bring to the meeting 25 of his better counterfeit Vuitton satchel purses"

Recognizing that it is generally deemed unethical for an attorney to participate in the surreptitious recordings of conversations, Bainton noted that he would not be similarly constrained if his application to be appointed special prosecutor were granted.

In an order dated the next day, Judge Lasker of this Court, finding that there was probable cause to believe that the named alleged criminal contemnors were "knowingly engaged in a course of conduct criminally contumacious of this Court's final consent judgment and permanent injunction filed July 30, 1982," granted attorney Bainton's application to be appointed, along with Devlin, "in connection with the further investigation" of the alleged contempt and "the ultimate prosecution therefor." In addition, the Court specifically granted Bainton and Devlin permission to undertake the investigation which they had proposed in their application. Judge Lasker ordered that both Bainton's affidavit and the Court's own order of authorization be kept under seal.

Six days later, on April 6, 1983, Bainton and Devlin, acting pursuant to Judge Lasker's request¹ appeared before me to notify the assigned judge about the granting of Bainton's March 31st application. Bainton also advised the Court that their investigation had revealed that Klayminc and others had continued to deal with counterfeit Vuitton goods. The Court suggested that Mr. Bainton bring the investigation to the official attention of the United States Attorney's Office in this district, and that if requested, he comply with any requests for further information or cooperation which might be made by that office. Mr. Bainton agreed to do so and by letter dated April 6, 1983 made available the evidence which his investigation had uncovered to the Chief of the Criminal Division of the U.S. Attorney's Office for this district.

Once appointed to prosecute the alleged criminal contemnors, Mr. Bainton directed an investigation which produced numerous video and audio recorded conversations among the alleged contemnors and members of the investigatory team. Based, in part, on the products of those recordings, Bainton requested and was granted, on April 29, 1983, an Order to Show Cause (for both civil and criminal contempt) against defendants Sol Klayminc, Barry Dean Klayminc, Gerald Young, David Rochman, Robert Pariseault, Nathan Helfand and George Cariste. The show cause order provided for the seizure of enumerated collections of counterfeit Vuitton goods, which had been identified during the course of the investigation, as well as equipment, promotional literature and records related to the manufacture and distribution of counterfeit Vuitton products.

1. On March 30, 1983, in my absence from the district, Vuitton's Rule 42 application was made before Judge Lasker, who was sitting in Part I of the Court. Judge Lasker requested that Mr. Bainton bring to this Court's attention the fact that he had signed the March 31 order.

Numerous pre-trial motions have since been made by the defendants, and on October 31, 1983, Bainton and attorneys representing each of the defendants appeared before the Court for oral argument. Post-argument briefs and letters were entertained by the Court, and the motions were fully submitted as of March 13, 1984. All of these motions will be addressed in this memorandum decision and where common legal issues are raised by two or more defendants, their motions will be considered together.

Motions to Revoke the Special Prosecutors' Appointment and Dismiss the Order to Show Cause.

The most significant challenge presented concerns the propriety of Judge Lasker's appointment of Mr. Bainton on March 31, 1983 as special prosecutor, and the nature and extent of his activities once invested with that authority.

The appointment of one of the attorneys in a civil action to prosecute a criminal contempt arising from a violation of the Court's orders in such an action is a long-standing practice the validity of which, in principle, is not subject to question. The most oft-quoted passage pertaining to this practice appears in a 1935 case arising in this Circuit, McCann v. New York Stock Exchange, 80 F.2d 211, where Judge Learned Hand held:

"Criminal prosecutions . . . are prosecuted either by the United States or by the court to assert its authority. The first are easily ascertainable; they will be openly prosecuted by the district attorney. In the second the Court may proceed *sua sponte* without the assistance of any attorney, as in the case of a disorder in the courtroom; there can be little doubt about the kind of proceeding when it is done. But the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should . . .* 80 F.2d at 214.

Our Court of Appeals has recently endorsed this time honored procedure in Musidor B.V. v. Great American Screen, 658 F.2d 60 (2d Cir.1981), cert. denied, 455 U.S. 944, 102 S.Ct. 1440, 71 L.Ed.2d 656 (1982), where it rejected a due process challenge to a criminal contempt conviction secured by a special prosecutor appointed under circumstances very similar to those in this case. In Musidor, as in the instant proceeding, the Court had entered an injunction against dealing in counterfeit T-shirts displaying the trademarks of three rock music groups, and when it became evident that violations of the injunction had occurred, the district court, acting pursuant to Rule 42(b), F.R. Crim.P., appointed the plaintiff's attorney, who had obtained the original injunction, to prosecute the charges. Rejecting the defendants' challenges, after their conviction, to the validity of this procedure, the Court of Appeals quoted approvingly from the McCann decision, and observed that the Advisory Committee on Rules had relied upon McCann in establishing Rule 42 of the Federal Rules of Criminal Procedure.² Id. at 64.

The Court restated the rationale underlying the practice, and rejected the argument that criminal contempts invariably must be prosecuted by the United States Attorney:

"Neither Rule 42 nor the Due Process Clause requires the court to select counsel from the staff of the United States Attorney to prosecute a criminal contempt. The practicalities of the situation -- when the criminal contempt occurs outside the presence of the Court but in civil litigation -- require that the Court be permitted to appoint counsel for the opposing party to prosecute the contempt. There is no fund out of which to pay

2. The McCann case is specifically cited in the Notes of the Advisory Committee to Rule 42, in conjunction with the Rule's requirement that the notice given to alleged contemnors describe criminal contempt as such in order to obviate the confusion experienced by the accused in McCann as to whether he was being proceeded against civilly or criminally.

other counsel in such an event, nor would it be proper that he be paid by the opposing party. This is not the kind of case for which legal aid societies or public defenders are available. In short, we follow the above quoted statement by Judge Hand in McCann." Id. at 65.

See also Universal City Studios v. Broadway Intern., 705 F.2d 94 (2d Cir.1983): "[T]he plain implication of the Rule is that the [contempt] proceedings are to be prosecuted either by the federal prosecutor or by a private attorney specifically designated to do so." Id. at 97. This practice has been endorsed and followed in other Circuits as well. See e.g., Frank v. United States, 384 F.2d 276 (10th Cir.1967), aff'd. on other grounds, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969); United States ex rel. Brown v. Lederer, 140 F.2d 136, 138 (7th Cir.1944), cert. denied, 322 U.S. 734, 64 S.Ct. 1047, 88 L.Ed.2d 1568 (1944); In re C.B.S., Inc., 570 F.Supp. 578 (E.D.La.1983).

Defendant Barry Klayminc, acknowledging that under McCann and Musidor, the appointment of private counsel is an acceptable, even "preferred" practice, urges this Court to distinguish or reject Musidor in light of decisions which have accorded defendants in criminal contempt cases procedural and constitutional protections enjoyed by other criminal defendants, discussed below. Even were this Court to disavow Musidor, defendants fail to demonstrate how the procedure provided for by Rule 42 is necessarily inconsistent with any of their due process rights.

In considering defendants' due process challenge to the Rule 42 proceeding approved in this case, and the special prosecutors' actions once invested with that authority, we must keep in mind the still unique status of criminal contempt. While defendants are correct in asserting that we are a long way from the common law treatment of alleged contemnors, which permitted procedures otherwise prohibited in ordinary prosecutions for crime, criminal contempt

continues to be characterized by procedures which distinguish it from ordinary statutory offenses. In this century, the Supreme Court has reduced this distinction to a great extent, having ruled, for example, that the standard of proof for criminal contempt is the same as that in any criminal action [Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911)]; that an alleged contemnor is entitled to assistance of counsel [Cooke v. United States, 267 U.S. 517, 45 S.Ct 390, 69 L.Ed. 767 (1925)]; and the right to a public trial before an unbiased judge [In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948)]. Most recently, in Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), the Supreme Court repudiated the longstanding exemption criminal contempts enjoyed from the constitutional requirements of a jury trial.

While it is certainly true that distinctions between contempt and other crimes have eroded, it is not the case, as defendants suggest, that in Bloom the Supreme Court swept away the last justification for according criminal contempt a special status. Before Bloom it had been undisputed that contempt had been treated differently under federal law:

"While contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government, proceedings to punish such offenses have been regarded as sui generis and not 'criminal prosecutions' within the Sixth Amendment or common understanding." Myers v. United States, 264 U.S. 95, 44 S.Ct. 272, 68 L.Ed. 577 (1925).

This distinction between statutory offenses and the Court's power to demand compliance with its mandates, United States v. Petito, 671 F.2d 68 (2d Cir.1982), cert. denied, 459 U.S. 824, 103 S.Ct. 56, 74 L.Ed.2d 60 (1982), has been the "doctrinal premise from which analysis of procedural safeguards has proceeded," United States v. Bukowski, 435 F.2d 1094, 1101 (7th Cir. 1970), cert. denied, 401 U.S.

911, 91 S.Ct. 874, 27 L.Ed.2d 809 (1971), and accordingly, contempt proceedings have been evaluated by the due process standard of "fundamental fairness" rather than under the specific constitutional provisions governing state and federal statutory offenses. Id. at 1101. See also United States v. Martinez, 686 F.2d 334, 343-44 (5th Cir.1982): "criminal contempts have retained their unique status as quasi-criminal sanctions." Id. at 343. While Bloom left no doubt that contempt defendants are entitled to all fundamental procedural protections, courts since 1968 have rejected the suggestion that Bloom "signalled an abandonment of the doctrine that attributes 'special constitutional status' to contempt proceedings." United States v. Nunn, 622 F.2d 802, 803 (5th Cir.1980); Bukowski, supra, 435 F.2d at 1100. Nor is this Court precluded from continuing to weigh, in addressing defendants' challenges to particular aspects of the instant contempt proceeding, the considerations of efficiency, cost and the public interest in vindicating the Court's authority which courts have cited in support of the special procedures provided for in Rule 42. Musidor, supra, 658 F.2d at 65; Universal City Studios, supra, 705 F.2d at 96; Nunn, supra, 622 F.2d at 804.

The procedure provided for in Rule 42 includes the appointment of an attorney of record to prosecute an alleged contempt. The fact that in general the appointment of the attorneys of record in the prior civil case was perfectly proper does not, of course, free us from the duty to address defendants challenges to the extent of the authority given those attorneys by Judge Lasker's order of appointment, or consider whether Mr. Bainton's activities, once vested with special prosecutor status, have in some way violated defendants' due process rights.

Defendants contend that Judge Lasker's order of March 31, 1983 granted Vuitton's civil attorneys greater authority as prosecutors than was intended in enacting Rule 42, and suggest that the court has taken it upon itself to bestow upon private attorneys unsupervised and unlimited discretion to engage in all those investigatory and supervisory functions traditionally performed only by the office of the United States Attorney.

Defendants' objections to the March 31st order center on their contention that this Court may authorize private attorneys under Rule 42 and Musidor to prosecute criminal contempts only when those contempts have "ripened," that is, at a time when it can be demonstrated that a defendant or defendants have completed a violation of the terms of an injunction or other court order with actual knowledge of the Court's directive. Defendants argue that at the time the Court appointed Mr. Bainton and Mr. Devlin as special prosecutors, the acts of criminal contempt complained of (violation of the terms of the injunction pertaining to the Vuitton trademark infringement) had not yet occurred, and that by permitting the plaintiff's attorneys to undertake the type of investigation outlined in Bainton's affidavit submitted in support of Vuitton's motion for his appointment under Rule 42, the Court exceeded its authority.

There would appear to be some validity to the defendants' contention that the Court may not, under Rule 42, confer unlimited authority on a private attorney to perform the full range of investigatory and prosecutorial duties performed by United States attorneys. E.g., United States ex rel. Vuitton et Fils S.A. v. McNally, 519 F.Supp. 185, 186 (E.D.N.Y.1981). It is clear, however, that in this case, contrary to the defendants' argument, Bainton and Devlin were not given authority to go out on a "hunting expedition"

for the purpose of "ensnaring" subject parties "before any probable act of contempt had been committed." (Memorandum of Law of defendant Sol Klayminc). The Bainton affidavit alleged that several of the defendants in this action, as well as others unknown to the plaintiffs at that time, had, at the time of Vuitton's application, committed and completed acts of criminal contempt. These allegations, supported by circumstantial evidence apparent in the marketplace, were considered sufficient by Judge Lasker to establish probable cause that a course of conduct had already commenced which was contumacious of the Court's orders in the Vuitton litigation.³ (See "Order Appointing Counsel and Approving Certain Investigatory Measures," March 31, 1983). To this extent, then, the Court did authorize the plaintiff's attorneys to prosecute a "ripened" case of criminal contempt. It is true, however, that the Court's order went beyond merely authorizing Vuitton's attorneys to prosecute "ripened" acts of contempt, and granted them the authority to "further investigate" and "ultimately prosecute" the

3. Mr. Bainton's affidavit described in considerable detail the criminally contumacious enterprise which was alleged to exist, and identified several individuals who were said to play prominent roles in the distribution of counterfeit Vuitton wares. Much of the information allegedly was provided by defendant Helfand, who, after being introduced to Askeland and Weinberg, enabled them to make purchases of bogus items from middle level distributors and small manufacturers. Helfand also brought Sol Klayminc to the investigators' attention. They were informed that he was operating a factory in Haiti which produced counterfeit Vuitton goods. According to Bainton's affidavit, later discussions centered on possible investment by Askeland and Weinberg in the Haiti factory. Submitted with Bainton's affidavit was a memorandum purportedly written by Klayminc which described the operation of that enterprise and gave its production forecast. (See Ex. E. to Bainton Affidavit, March 30, 1983). At the meeting at which the Haiti operation was discussed, Helfand delivered several counterfeit Vuitton items which were allegedly produced by Klayminc. Other individuals who are accused of having participated in the distribution of counterfeit Vuitton merchandise, including alleged confemnor George Cariste, were identified through Helfand. The allegations contained in the Bainton affidavit were sufficient, as Judge Lasker found, to support a finding of probable cause that a substantial criminally contumacious enterprise was in operation.

allegedly contumacious conduct, and, more specifically, to engage in the investigative techniques set forth in the Bainton Affidavit. It is the Court's authorization of additional investigation that the defendants object to most strenuously.

Defendants argue that in Musidor and indeed in all previous cases in which the Rule 42 procedure has been employed, the Special Prosecutor was not required to conduct an extensive investigation to establish the alleged acts of contempt which he sought to prosecute. Quite to the contrary, however, the evidence on which the convictions in Musidor were based was obtained through the services of a licensed private investigator, who at various times conducted surveillance on behalf of the plaintiffs, thereby establishing that the defendants were dealing in counterfeit T-shirts in violation of a prior injunction. 658 F.2d at 63. While it would appear that in Musidor, the investigation was conducted prior to the request for an order to prosecute under Rule 42, defendants have not explained why it should matter whether the investigation required to prove the existence of the ongoing criminal contempt is performed entirely prior to that request or is performed partially, as in this case, after that order is obtained, so long as the prosecution proceeds in a proper fashion, and defendants' constitutional rights are fully protected.

Contrary to the defendants' assertions, the Court's order of March 31st did not constitute a "hunting [or fishing] license" with which Vuitton's attorneys could go out and indiscriminately "troll" for potential contemnors. Rather, having demonstrated probable cause that a course of conduct criminally contumacious of this Court's earlier civil injunction was occurring, Vuitton's attorneys were given the authority to define more fully the boundaries of an already well developed contempt. The history of this and similar litigation shows

that any action less encompassing than Bainton's attempts to discover the individuals violating a previous injunction will not suffice. In light of the apparent sophistication and resources of those who engage in mass violations of contempt orders in trademark infringement actions, a piecemeal approach, whereby the special prosecutor would have to find at least one act of fully "ripened" contempt before requesting permission to proceed against a particular individual, would prove unavailing.⁴ This is not to say that by allowing the prosecutor, as the March 31st order in this case does, to attempt to identify others unknown to him who are participating in an ongoing criminally contumacious course of conduct the Court authorizes him to do so through unlawful means. (See discussion of the actions of the Special Prosecutor, infra).

4. The agility and resourcefulness of wholesale and retail purveyors of counterfeit trademarked goods is at one with the business acumen of cocaine dealers, as is demonstrated in Vuitton's previous attempts by litigation to quell distribution of cheap bogus merchandise which dilutes its valued mark. The Court of Appeals noted the difficulty attendant upon such cases of trademark infringement and unfair competition in Matter of Vuitton et Fils, S.A., 606 F.2d 1 (2d Cir.1979). In that case, the Court quoted with approval from an affidavit presented by Vuitton:

"Vuitton's experience, based upon the . . . actions it has brought and the hundreds of other investigations it has made . . . has led to the conclusion that there exist variously closely-knit distribution networks of counterfeit Vuitton products.

Vuitton's experience in several of the earliest cases also taught it that once one member of this community of counterfeiters learned that he had been identified by Vuitton and was about to be enjoined from continuing his illegal enterprise, he would immediately transfer his inventory to another counterfeit seller, whose identity would be unknown to Vuitton." Id. at 2.

This modus operandi, which the Court of Appeals in Matter of Vuitton labeled the "persistent factual patterns in Vuitton cases," Id. at 3, n. 5, surely justifies Vuitton's approach in this case, which attempted to identify as many members as possible of a distribution network before seeking an order to show cause.

Defendants suggest that Bainton's activities in his role as "prosecutor" must be narrowly circumscribed under the terms of the Rule, and restricted, essentially, to in-court prosecution of fully "ripened" contempts, or the presentation of a show cause order once a contempt has been committed. In support of this construction of Rule 42, defendants contend that nothing in the language of the Rule entitles specially appointed counsel to exercise the wider powers enjoyed by government prosecutors. Defendants fail to point to any cases in which the Rule has been construed in this limited fashion. Indeed, the meaning of the words "to prosecute" as used in Rule 42 has not been at issue in any of the prior cases dealing with this practice. In construing language used in legislation, it must be kept in mind that in the absence of legislative history to the contrary, or some other compelling reason, a Court must conclude that words were meant to have their normal or commonly accepted meaning:

"As in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' Reiter v. Sonotone Corp., 442 U.S. 330, 337 [99 S.Ct. 2326, 2330, 60 L.Ed.2d 931] (1979), and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.' Richards v. United States, 369 U.S. 1, 9 [82 S.Ct. 585, 590, 7 L.Ed.2d 492] (1962). Thus '[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 [100 S.Ct. 2051, 2056, 64 L.Ed.2d 766] (1980)." American Tobacco Co. v. Patterson, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982).

See also, United States v. Blasius, 397 F.2d 203 (2d Cir.1968), cert. denied, 393 U.S. 1008, 89 S.Ct. 615, 21 L.Ed.2d 557 (1969); United States v. Rose, 549 F.Supp. 830 (S.D.N.Y.1982). Accordingly, it is clear that a special prosecutor's authority under Rule 42 extends beyond simply presenting evidence in court.

Limiting the extent of an appointed prosecutor's authority in the manner suggested by the defendants would have the effect of defeating the very interests which the procedure is designed to serve. Defendant Barry Klayminc, citing the Court of Appeals' assessment of the practical reasons underlying the Court's authority under rule 42 (see pp. 739-740, supra), states that the "logical solution to the concerns expressed by the Court in Musidor is to refer all criminal contempt cases to the public prosecutor." (Defendant Kalyminc's Reply Brief, p. 10). Realistically, however, for many reasons, aggrieved plaintiffs like Vuitton cannot depend on the United States Attorney's Office to enforce the court's mandates in civil cases of this nature.

The offices of the United States Attorneys throughout the nation are already overburdened by those civil and criminal matters for which they have exclusive responsibility,⁵ and while in particular cases it may be necessary for them to prosecute conduct criminally contumacious of a civil order, the special appointment procedure provided for in Rule 42 provides a fair and efficient method of vindicating "the public interest in orderly government [which] demands

5. For example, on a national basis, the number of criminal cases filed in United States District Court has increased perceptibly in recent years, as the following statistics make clear:

UNITED STATES DISTRICT COURTS
Criminal Cases Filed During
Twelve Month Periods Ending in March

1980.....	28,458
1981.....	30,347
1982.....	31,942
1983.....	34,778

Expressed as a percentage, the number of criminal cases filed between March 31, 1982 and March 31, 1983 increased by 8.9%. Administrative Office of the United States Courts, Federal Judicial Workload Statistics (1983), p. 13. For the same period, the number of civil filings in which the federal government was a party rose from 70,585 to 89,512, an increase of 26.8%. Id. at 7.

respect for compliance with court mandates," United States v. Petito, 671 F.2d 68, 72 (2d Cir.1981), and protecting the interests of civil plaintiffs like Vuitton.

The very scope of the allegedly contumacious enterprise in the instant case, which, according to affidavits and statements submitted by Vuitton's counsel, extends across the United States and beyond its borders, and involves many individuals and millions of dollars in counterfeit merchandise, illustrates the infeasibility of the defendants' contention that the United States Attorney must bear the sole burden of investigating and prosecuting such large and involved issues. The defendants would restrict the special prosecutor's authority to those contempts only which have ripened fully, and would not permit the prosecutors to oversee any post-appointment investigation, as they did in this case. The impracticality of this approach and the effect it would have on plaintiff's ability to make use of the procedure provided for in Rule 42 have already been discussed.

Defendants also assert that the Court's earlier Order constitutes a violation of separation of powers principles in that the federal courts may not order the United States Attorney either to conduct an investigation of allegedly criminal activity or to prosecute a particular case, e.g., Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2d Cir.1973); Cox v. United States, 342 F.2d 167 (5th Cir.), cert. denied sub nom. Cox v. Hauberg, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965). There are obvious differences between a case involving a judicial attempt to supervise investigation and prosecution by the United States Attorney and the instant matter, where the appointment of special prosecutor was pursuant to a request made under Rule 42.

Because we find that Rule 42 confers sufficient authority upon the Court to authorize a special prosecutor to undertake the activities performed in this case, we need not determine whether, as Vuitton contends, the All Writs Act, 28 U.S.C. § 1651, similarly empowers the Court to approve these actions. We would observe, however, that insofar as the All Writs Act has been construed to permit a federal court to "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained," United States v. New York Telephone Co., 434 U.S. 159, 172, 98 S.Ct. 364, 372, 54 L.Ed.2d 376 (1977), it also provides authority for the Court's order in this case.

Of course, as the Court has noted, the interests served by this procedure cannot take precedence over a defendant's due process rights. The Court will next address defendants' specific objections to the appointment made in this case, and to the special prosecutors' actions once appointed.

Defendants focus on the conflict of interest which is said inevitably to inhere in this setting. They observe, correctly, that the role of a public prosecutor is not exclusively, or even primarily, adversarial in nature, but exists to insure that "justice shall be done," Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). Sensitive to the prosecutor's obligation to the defendant, the public and the criminal justice system, courts have not been hesitant to consider challenges to convictions obtained by government attorneys burdened with a real conflict of interest. E.g., Berger, supra; Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); Connally v. Georgia, 429 U.S. 245, 97 S.Ct. 546, 50 L.Ed.2d 444 (1977).

Defendants allege that Mr. Bainton possesses several personal interests which might cause his actions in prosecuting this matter to be governed by something other than his obligation to see that justice be done. The Klaymincs seek to disqualify him from further involvement in this prosecution on the ground that he has two pecuniary reasons for winning contempt convictions. The first is said to derive from the fact that because Vuitton has bankrolled his prosecutorial efforts, Bainton will be expected to win convictions for his client and if he does not, Vuitton will take its future substantial legal business elsewhere. Therefore, it is argued, it is unlikely that he would drop charges which ultimately prove unsupportable, or which the "interests of justice" might require be disposed of by negotiated plea. If the Court were to accept this reasoning as grounds for disqualifying counsel in the instant case, it would have to do so in every other trademark case in which a civil plaintiff seeks to have an injunction enforced against a particular defendant, since counsel in all of these cases are compensated by the civil clients. This consideration cannot have escaped the notice of courts which have approved the appointment of privately retained counsel as special prosecutors in previous cases. In Musidor, for example, a similar allegation was made concerning the prosecutor appointed by the court. The defendants suggested that because the injunctions violated in Musidor were issued in civil actions in which substantial damages were sought, the prosecutor's financial interest in the outcome of the pending civil litigation was an inducement for him to behave unfairly in the trial of the contempt charges so as to obtain an advantage in the civil case. The court refused, on this basis, to overturn the contempt convictions secured by him. 658 F.2d at 64.

Defendants allege, as a second pecuniary motivation, the fact that Mr. Bainton and his law firm are defendants in a defamation action brought in the New York State courts by Sol Klayminc. This lawsuit, the existence of which was revealed to the Court in Bainton's application for appointment of counsel, was commenced in 1982, after Klayminc's federal conviction for contempt of a Court order prohibiting him from dealing in counterfeit Vuitton wares. It has never been brought to trial. In his complaint in the state court defamation action, Klayminc alleges that Mr. Bainton made derogatory remarks about him during the course of the prior federal action. Details of this state case, which although almost two (2) years old, apparently has not progressed substantially beyond the complaint stage, were explored by the Court during the October 31, 1983 hearing (Tr. 6, 7, 48-50).

'Mr. Bainton personally is protected from any financial loss by his firm's liability insurance, and in any event the Court declines to find that Mr. Bainton would be so motivated by the outcome of the defamation case that he will attempt to obtain unjust criminal convictions of the Klaymins in order to improve his position in the state defamation action. Indeed, since the civil case has never been placed on a trial calendar or brought to trial, although pending since 1982, an inference follows that it is a frivolous lawsuit interposed solely to impede Vuitton in protecting its mark.⁶

6. By a letter filed after the October 31, 1983 hearing had closed, defendant Sol Klayminc raises an additional argument with respect to the conflict of interest claim. He asserts that having filed a petition in bankruptcy, Vuitton, represented by Mr. Bainton's lawfirm, has filed a complaint to determine non-dischargeability. This post-hearing contention is not regarded as sufficient to require disqualification.

In making these and other arguments, the defendants overlook the commitment of this Court that throughout these proceedings they will be afforded all procedural protections due them. The Court's approval of Vuitton's application in this case does not give the special prosecutors any letters of marque or reprisal against the defendants. This Court will continue to entertain all substantive objections to the manner in which the prosecution is conducted, and will assure that defendants are accorded all the protections given to other criminal defendants.

Defendant Klayminc argues, for example, that a possible source of prejudice to the defendants is that any exculpatory Brady or § 3500 material Mr. Bainton may possess may have come to him within the confines of the Vuitton/Bainton attorney-client privilege. The Court addressed this point during the hearing and has ruled explicitly that Vuitton must release all such material. The Court stressed that the plaintiff has, by authorizing Bainton's efforts and, presumably paying for them, waived any such privilege it might otherwise enjoy. (Tr. 12-13).

Defendants also challenge the propriety of the eavesdropping which was conducted in California following the issuance of Judge Lasker's order Approving Counsel and Approving Certain Investigatory Measures. Defendants note that several provisions of the California Penal code appear to prohibit the surreptitious recording of confidential communications by any "person," defined as including government officials, whether state, local, or federal.⁷ Under the

7. The relevant portions of the California Penal Code provide:

"§ 631
(a) Prohibited acts; punishment; recidivists
(a) Any person who, by means of any machine, instrument, or contrivance, or in any other manner,
[footnote continues on following page]

terms of the California Penal Code, however, state and local attorneys

7. [continued from previous page]
intentionally taps, or makes any unauthorized connection
. . . with any telegraph or telephone wire, line, cable, or
instrument, . . . or who willfully and without the consent
of all parties to the communications, or in any unauthorized
manner, reads, or attempts to read, or to learn the contents
or meaning of any message, report, or communication while
the same is in transit . . . is punishable by fine . . . or
by imprisonment . . . *

(c) Evidence

(c) Except as proof in an action or prosecution for
violation of this section, no evidence obtained in violation
of this section shall be admissible in any judicial,
administrative, legislative or other proceeding.
§ 632 Eavesdropping on or recording confidential
communications

(a) Prohibited acts; punishment; recidivists

(a) Every person who, intentionally and without the consent
of all parties to a confidential communication, by means of
any electronic amplifying or recording device, eavesdrops
upon or records such confidential communications . . . shall
be punishable by fine . . . or by imprisonment. * * *

(b) Person

(b) The term 'person' includes an individual, business
association, partnership, corporation, or other legal
entity, and an individual acting or purporting to act for or
on behalf of any government or subdivision thereof, whether
federal, state, or local, but excludes an individual known
by all parties to a confidential communication to be
overhearing or recording such communication.

(d) Evidence

(d) Except as proof of an action or prosecution for viola-
tion of this section, no evidence obtained as a result of
eavesdropping upon or recording a confidential communication
in violation of this section shall be admissible in any
judicial, administrative, legislative or other proceeding.

* * * * *
§ 633 Law enforcement officers; authorized use of
electronic, etc., equipment

Nothing in Section 631 or 632 shall be construed as
prohibiting the Attorney General, any district attorney, or
any assistant, deputy, or investigator of the Attorney
General or any district attorney, or any officer of the
California Highway Patrol, or any chief of police, assistant
chief of police, or policemen of a city or city and county,
or any sheriff, under sheriff, or deputy sheriff regularly
employed and paid as such of a county, or any person acting
pursuant to the direction of one of the above-named law
enforcement officers acting within the scope of his
authority, from overhearing or recording any communication
which they could lawfully overhear or record prior to the
effective date of this chapter." West's Ann.Cal.Pen.Code,
§§ 631-633.

and law enforcement officials are authorized to record conversations in exercising their official duties.

On April 6, 1983, one week after obtaining the appointment and order from Judge Lasker, Mr. Bainton informed the Court that he had recorded several telephone conversations in New York City. Shortly thereafter, on April 13th, Mr. Bainton wrote to Head Deputy District Attorney Kildebeck of Los Angeles, to whom he had spoken the day before, informing him of his appointment as special prosecutor. Noting that the Penal Code seemed to prohibit him, as a federal official, from supervising eavesdropping in California, Mr. Bainton agreed to Mr. Kildebeck's request that so much of the investigation that was being conducted in California be done at the direction of the latter's office. (Tr. 234-35). The undercover investigation subsequently completed yielded over 70 tape recordings and several videotapes, all made in California, which were cited in requesting the show cause order on April 29th.

Defendant's contention that Mr. Bainton behaved improperly in "supervising" the California wiretaps is without merit. Even if Mr. Bainton's actions were not supervised in turn by the Los Angeles District Attorney, as they appear to have been, any construction of the California Penal Code which would prevent a duly appointed federal prosecutor from making tapes which are valid and admissible under federal law would be, as the Ninth Circuit has held in United States v. Kerrigan, 514 F.2d 35, 37, n. 5 (9th Cir.1975), "wholly unsupportable." This is because constitutional activities of the federal government are immune from state regulation in the absence of clear Congressional authorization of a particular state regulation. Hancock v. Train, 426 U.S. 167, 179, 96 S.Ct. 2006, 2012, 48 L.Ed.2d 555 (1976); Perez v. Campbell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971).

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While immunity from such state regulation extends to individual federal government agents in the performance of their duties, United States v. City of Pittsburg, Cal., 661 F.2d 783, 785 (9th Cir.1981), defendants contend that Mr. Bainton does not enjoy such immunity because, since he is compensated by a private party, he cannot be elevated to the status of a federal employee. The Court rejects this argument. Once appointed a special prosecutor for purposes of this action, Mr. Bainton is protected by the same official immunity that federal officials enjoy in carrying out their duties, regardless of the source of his compensation.

Defendant Barry Klayminc asserts that an additional reason to dismiss the show cause order stems from the special prosecutor's failure to initiate the proceedings by indictment. This argument need not detain us. As the Court has discussed above, criminal contempt proceedings occupy a unique position. One aspect of contempt which separates it from other criminal offenses is the provision, in Rule 42, for the initiation of proceedings by notice, rather than by indictment or information. Defendants contend that the Supreme Court's decision in Bloom, holding that jury trials must be provided in serious contempt cases, overruled, sub silentio, its previous decision in Green v. United States, 356 U.S. 165, 78 S.Ct. 632, 2 L.Ed.2d 672 (1958). This argument has been made many times before, but until now the federal courts have refused to require that criminal contempts proceed by way of indictment. E.g., Martinez, supra, 686 F.2d at 343; Nunn, supra, 622 F.2d at 804; United States v. Marthalier, 571 F.2d 1104 (9th Cir.1978); Eichhorst, 544 F.2d 1383, 1386, (7th Cir.1976). Defendants' attempt to distinguish these cases because the contempt proceedings in this case were initiated by a specially appointed prosecutor, rather than by a U.S. Attorney, does not persuade the Court that a departure from this authority is warranted.

In conclusion, the Court declines as a matter of discretion to grant the defendants' request to dismiss the order to show cause and revoke the special prosecutors' appointment.

Specificity

Defendants Rochman, Young, Cariste and Helfand move to dismiss the order to show cause based on what they claim to be its failure to apprise them adequately of the charge against them, and to allege, with specificity, that they had actual knowledge of the injunction they violated. Defendants argue, correctly, that as non-parties to the injunction issued on July 30, 1982, they may not be found guilty of criminal contempt thereof absent proof that at the time they allegedly acted in violation of the injunction, they had actual knowledge of its existence. Vuitton et Fils S.A. v. Carousel Handbags, 592 F.2d 126, 129 (2d Cir.1979); United States v. Baker, 641 F.2d 1311, 1315 (9th Cir.1981). Reasoning that since this knowledge is an essential element of the crime with which they are charged, they argue that the show cause order should be dismissed, because it contains no evidentiary showing that they possessed the requisite mental state.

Rule 42(b) "requires criminal contempt to be prosecuted on notice stating the essential facts constituting the contempt charged," United States v. United Mineworkers of America, 330 U.S. 256, 296, 67 S.Ct. 677, 697, 91 L.Ed. 884 (1947). As this Court has held herein, Rule 42(b) does not require that contempt proceedings be initiated by a grand jury indictment, and accordingly, the particularity and technical accuracy of an indictment is not required in a prosecution on notice case of this type:

"Instead, all that is required is that the [defendants] have been 'fairly and completely apprised of the events and conduct constituting the contempt charged.' This is to be judged with

reference to all of the court papers served on appellants in light of what transpired in the Court proceedings." United States v. Eichhorst, 544 F.2d 1383, 1386 (7th Cir.1976); see also United States v. Martinez, supra, 686 F.2d at 345.

Judged by this standard, the notice provided to these defendants in the show cause order provided sufficient information to inform them of the nature and particulars of the contempt charge. The show cause order alleges with respect to each defendant that he is charged with criminal contempt, enumerates the specific role he is alleged to have performed in the production and distribution of counterfeit Vuitton items, and alleges that he had actual knowledge of the terms of the injunction. For example, with regard to defendant Helfand, the show cause order states at p. 6 that:

- "(a) In or about March, 1983, Helfand purchased 'samples' of counterfeit Louis Vuitton merchandise from Klayminc, Sr., to show Weinberg;
- (b) On or about April 1, 1983, Helfand introduced Weinberg to Klayminc, Sr., for the purpose of facilitating Klayminc, Sr.'s sale to Weinberg of substantial quantities of counterfeit Louis Vuitton merchandise;
- (c) During March and April 1983, Helfand aided and abetted Klayminc, Sr., in convincing Weinberg to agree to invest in Klayminc, Sr. and Klayminc, Jr.'s Haitian Louis Vuitton Counterfeiting operation. Helfand engaged in each of the foregoing acts with others with actual knowledge of the injunction and in wanton disregard thereof."

The Court finds that the allegations against each of the defendants "satisfies due process by 'containing enough to inform [them] of the contempt charged.'" Martinez, supra, 686 F.2d at 345, quoting United States v. Robinson, 449 F.2d 925 (9th Cir.1971).

Concerning the defendants' complaint that the show cause order does not make a sufficient factual showing that they had actual knowledge of the 1982 injunction, the Court notes that in light of the limited nature of the notice required under Rule 42, Vuitton was not required to allege evidentiary facts supporting every element of the

crime charged. Cf., United States v. Eichhorst, *supra*, 544 F.2d at 1385, 1386.

At trial, the Government will be required to prove beyond reasonable doubt as to each defendant, actual knowledge of the prior injunction. It is not required, however, to alleged knowledge with greater specificity at this stage of the proceedings.

Even if the defendants' argument that the Government must demonstrate probable cause that the defendants had such knowledge were accepted, the Court believes that the order to show cause, when read in conjunction with the Bainton Affidavits of March 30th and April 29th, and documents submitted therewith, does present substantial evidence that the defendants were aware of the Consent Order and Injunction issued in July 1982.

It is also suggested that the Government should be required to allege facts sufficient to establish probable cause to believe that the acts of contempt alleged actually occurred. While a Court may in its discretion require such a showing in a contempt proceeding, In re United Corporation, 166 F.Supp. 343 (D.Del.1958), this is not mandatory and the pleadings in support of the issuance of the show cause order may rest solely upon information and belief. United States v. United Mineworkers, *supra*, 330 U.S. at 296, 67 S.Ct. at 697; Wright & Miller, Federal Practice and Procedure (Criminal) § 710.

Motions for a Separate Trial

Defendants Rochman, Young and Pariseault move, pursuant to Rule 14 of the Rules of Criminal Procedure, for a trial severance. In addition, Rochman moves under Rule 21(b) for a change of venue.

Rule 21(b) provides that: "for the convenience of parties and witnesses, and in the interest of justice, the court upon motion

of the defendant may transfer the proceeding as to him . . . to another district." A motion for a change of venue is addressed to the sound discretion of the trial judge, United States v. Garber, 413 F.2d 284 (2d Cir.1969), and in determining the propriety of a transfer request, he is to be guided, in general, by the criteria set forth in Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 84 S.Ct. 769, 11 L.Ed.2d 674 (1964). The factors to be considered in addressing Rochman's motion are: location of the defendant, counsel, potential witnesses, and documents and records likely to be in issue; disruption of the defendant's business; expense to the parties; relative accessibility of the place of trial; and the docket condition of each district involved. Id. In support of his motion to transfer his case to Arizona, Rochman alleges that he resides in Arizona, that his witnesses all reside in or near Phoenix, Arizona, or Los Angeles, California, that the events in his case occurred in the far West, that New York is not easily accessible for him, his witnesses, and his attorney, who also resides in Arizona. In conjunction with his argument that his witnesses will be severely inconvenienced by a trial in this District, Rochman focuses in particular on the large expense he will incur if forced to transport them to New York.

While it is undoubtedly true that he would find it more convenient to be tried in Arizona and several factors favor such a transfer, the Court finds that defendant has failed to meet his burden of establishing either that a substantial balance of inconveniences is in his favor, or that the interests of justice require a transfer. United States v. Wheaton, 463 F.Supp. 1073, 1079 (S.D.N.Y.1979); United States v. Williams, 437 F.Supp. 1047, 1051 (W.D.N.Y.1977). Rochman has failed to support, with requisite specificity, his claim that his witnesses will be inconvenienced by trial in this district.

Simple assertions that witnesses will be burdened by trial in a distant forum will not suffice:

"[T]ransfer motions must identify inconvenienced witnesses whom defendants propose to call and contain a 'showing' of the proposed witnesses' testimony. Defendants must offer specific examples of witnesses' testimony and their inability to testify because of the location of the trial. In short, in order to make an informed decision regarding the necessity of those defense witnesses who would be inconvenienced or unable to attend trial absent transfer, the court must rely on 'concrete demonstrations' of the proposed testimony." United States v. Haley, 504 F.Supp. 1124, 1126 (E.D.Pa.1981) and cases therein cited (footnotes omitted); United States v. Aronoff, 463 F.Supp. 454, 460 (S.D.N.Y.1978).

While in an affidavit accompanying his motion to transfer, Rochman does name each of the seventeen witnesses he proposes to summon in his behalf, Rochman fails to allege what the substance of their testimony will be, nor does he cite specific examples of their testimony, beyond the most vague identification of each witness as an "activities," "records," or "character" witness. We are not informed what "activities" or "records" these witnesses would testify about, or how this testimony would relate to the offense with which he is charged, or why the records, or for that matter, the activities, could not be the subject of a stipulation. Accordingly, movant has failed to present an adequate basis to support his contentions concerning the defense witnesses.

While defendant is able to demonstrate that trial in this district would interrupt his employment, the Court is not persuaded that he would, as he claims, lose his job. Although he maintains that he has "neither relatives nor business associates who could assist him in maintaining his job responsibilities with Host National," evidently this may not be the case since his employer is his partner and brother-in-law.

The docket condition of this district as opposed to that of the district of Arizona does not, as Rochman maintains, argue in favor of a transfer here. This court is current with its criminal calendar, and in any event, the applicable Speedy Trial Act requirements have preempted this Platt factor.

Other factors militate against directing a transfer in this case. As the special prosecutor has noted, it is not alleged, as Rochman suggests, that all of his conduct which is alleged to be contumacious occurred in Arizona or California. Evidently the Government's proof will attempt to show that Rochman also met the undercover agents in New York, and then accompanied them elsewhere to factories at which counterfeit Vuitton goods allegedly were produced.

If Rochman's case is transferred, the cases of the non-moving defendants will still be tried in New York. In assessing the balance of inconveniences, this Court is entitled to weigh the duplication of effort and court time, as well as additional expense that would be incurred by such a partial transfer. United States v. Wheaton, supra, 463 F.Supp. at 1079. The Court does not find that defendant's allegations with respect to the other Platt criteria, when considered collectively and weighed against the inconvenience of a transfer, are sufficient to justify a change of venue under Rule 21(b) and, accordingly, the defendant's motion is denied.

In addition to his transfer request, Rochman moves for a severance pursuant to Rule 14, which provides:

"If it appears that a defendant or the Government is prejudiced by a joinder . . . of defendants . . . for trial together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires."

Defendants Young and Parise&UIT also request separate trials.

A defendant seeking a severance bears a "heavy burden" of demonstrating that he will suffer "substantial prejudice," from a joint trial, United States v. Carson, 702 F.2d 351, 366 (2d Cir.), cert. denied sub nom. Mont v. United States, ___ U.S. ___, 103 S.Ct. 2456, 77 L.Ed.2d 1335 (1983):

"Substantial prejudice does not mean merely a better chance of acquittal. The prejudice must be of such a degree that the defendant's rights cannot be 'adequately protected by appropriate admonitory instruction to the jury,' and 'such that, without a severance,' he would 'not receive a fair trial.' Absent such a showing the defendant's request for a separate trial must give way to the public interest in avoiding unnecessary duplicative efforts, trial time and expense." (Citations omitted). United States v. Potamitis, 564 F.Supp. 1484, 1486 (S.D.N.Y.1983).

Defendant Rochman bases his request for severance on the fact that he is joined with defendants who previously have been involved in Vuitton contempt litigation. Noting that he was not a party to the injunction whose terms he has allegedly violated, has never been involved with any prior trademark litigation, and has only been involved in the "industry" recently, Rochman argues that there is a significant risk that evidence pertaining to the more culpable defendants will "rub off" on him. This argument, commonly referred to as the "spillover" effect, has been made on numerous occasions, most recently in Carson, supra, where a defendant asserted that the disproportionate nature of the charges against him, vis-a-vis his co-defendants, and proof that the heroin conspiracy was a "family business" in which his co-defendants had been long involved, caused substantial prejudice to him. Like Rochman, the defendant in Carson alleged that the substantial evidence amassed against one defendant will necessarily spill over into the jury's consideration of his less culpable co-defendant. Conceding that there was "no question" that the defendant had played a lesser role in the conspiracy, the Court of

Appeals rejected the appeal from denial of severance: "[D]iffering levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials." Id. at 366-67; see also United States v. Alois, 511 F.2d 585, 598 (2d Cir.), cert. denied, 423 U.S. 1015, 96 S.Ct. 447, 46 L.Ed.2d 386 (1975); Potamitis, supra, 564 F.Supp. at 1486.

Rochman's contention constitutes "no more than the usual claim that [he] might fare better if severed," which is insufficient, without more, to justify severance. United States v. Stirling, 571 F.2d 708, 733 (2d Cir.), cert. denied, 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed.2d 116 (1978). We are persuaded that the Government's case against Rochman, which is described as consisting mostly of recordings, will be "straightforward enough for the jury to consider without any significant spillover effect," United States v. Losada, 674 F.2d 167, 171 (2d Cir.1982), cert. denied, 457 U.S. 1125, 102 S.Ct. 2945, 73 L.Ed.2d 1341 (1982). Moreover, limiting instructions as to the use of evidence against each defendant will be sufficient to overcome any prejudice.

Rochman suggests that because several of his co-defendants have been defendants in prior criminal and civil contempt proceedings, evidence of their prior involvement in counterfeiting activities presumably will be presented at trial, and will have a prejudicial effect on his case. In making this argument, defendant overlooks the fact that at trial the Court will instruct the jury to accord each defendant separate consideration, and to refrain from weighing evidence admissible against one defendant against another. Carson, supra, 702 F.2d at 367; United States v. Rosenwasser, 550 F.2d 806 (2d Cir.), cert. denied, 434 U.S. 825, 98 S.Ct. 73, 54 L.Ed.2d 83 (1977).

Rochman also contends that as in Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), a severance is required here because the prosecution intends to use the inculpatory statements of co-defendants against him, depriving him of his right to confront the witnesses against him. This point need not detain us. Assuming that Rochman's prediction about the Government's strategy comes to pass, this argument is premature since Bruton would apply only if one or more of his co-defendants elected not to take the stand at trial, and we cannot know, at this stage, whether this will occur. United States v. Holman, 490 F.Supp. 755, 764-65 (S.D.N.Y.1980); United States v. Olin Corp., 465 F.Supp. 1120, 1130 (W.D.N.Y.1979). Furthermore, Bruton does not apply to a co-defendant's extra-judicial admission which may be received in evidence under Rule 801(d)(2)(D) or (E), F.R.Evid. Accordingly, Rochman's motion for severance is denied.

Defendant Young also asserts that the extensive nature of the evidence which the prosecution will offer against his co-defendants will have a spillover effect on his case, and that the jury will be unable to separate evidence bearing on his guilt from that pertaining to his co-defendants. Essentially, these are the same arguments made in favor of severance by defendant Rochman. The Court finds that Young's "spillover" argument is no more persuasive than that made by Rochman, and believes that a properly instructed jury will be able to deal fairly with each defendant. Unlike the defendant in United States v. Mardian, 546 F.2d 973 (D.C.Cir.1976), which he cites, Young is a participant in several of the recordings and tapes which the prosecution will attempt to introduce. As with Rochman, the Court finds no merit in Young's Bruton argument.

In support of his motion to sever, defendant Pariseault merely alleges, in a conclusory fashion, 'joinder will be prejudicial

to him because of the extensive nature of the testimony against his co-defendants and the possibility that they may have inconsistent defenses. The fact that evidence against Pariseault's co-defendants may be stronger than what is offered against him, or the presence of hostility among Pariseault and his co-defendants are insufficient, without more, to justify severance. Potamitis, supra, 564 F.Supp. at 1486-87.

In addition to his motion to sever, Mr. Pariseault submitted a number of discovery and inspection motions. Most of these requests were disposed of orally by the Court at the October 31, 1983 hearing on the defendants' motions. The motions not disposed of at that time included requests to be furnished with records of electronic surveillance and the photographs viewed by prosecution witnesses, as well as a motion to suppress any recordings or photographic evidence against Mr. Pariseault. The Court assumes that any Brady material or additional discovery material that is required by the defendant to prepare for trial will be provided in accordance with the customary practice in this district. Defendant's motion to suppress is denied.

Conclusion

The foregoing constitutes the Court's rulings on the motions submitted by each of the alleged contemnors. All of the defendants' motions are denied.

This case is set for a jury trial before this Court on May 14, 1984 at 10:00 A.M. in courtroom 705. All parties and counsel will be ready for trial as of that date.

So ordered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VUITTON ET FILS S.A., :
Plaintiff, :
-against- : 78 Civ. 5863 (CLB)

KAREN BAGS, INC., JADE HANDBAG CO., : FINAL CONSENT
INC., SOL N. KLAYMINC and DAVID : JUDGMENT AND
KASMAN doing business as JADE : PERMANENT
HANDBAG CO., and JAK HANDBAG INC., : INJUNCTION

Defendants,

:

-and-

:

SLYVIA KLAYMINC and BARRY :
KLAYMINC, :

Additional Contemnors. :

- - - - - x

Plaintiff Vuitton et Fils S.A. ("Vuitton"), having duly commenced this action by filing the complaint herein against defendants Karen Bags, Inc., Jade Handbag Co., Inc., Sol N. Klayminc and David Kasman doing business as Jade Handbag Co., alleging violations of its rights in connection with its Registered Trade-Mark 297,594, and service of the complaint having been made on December 7, 1978; and defendants Sylvia Klayminc and Barry Klayminc having been joined as contemnors of this Court's order dated December 12, 1978, by orders dated July 8, 1981, and June 22, 1982, respectively; and defendant Jak Handbag Inc., having hereby consented to its joinder as a party defendant; and said defendants having consented to the entry of this judgment and to each and every provision, order and decree hereof; and said defendants having been represented by counsel, whose name appears hereinafter; and

It further appearing that this Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1332, 1338, 15 U.S.C. §

1121 and the principles of pendent jurisdiction;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants Karen Bags, Inc., Jade Handbag Co., Inc., Jak Handbag Inc., Sol N. Klayminc, Sylvia Klayminc and Barry Klayminc and their officers, directors, employees, agents, assigns and successors and all those acting in concert or participation with them be, and they hereby are, permanently enjoined from:

(a) imitating, copying or making unauthorized use of

Vuitton's Registered Trade-Mark 297,594;

(b) manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any product bearing any simulation, reproduction, counterfeit, copy or colorable imitation of Vuitton's Registered Trade-Mark 297,594;

(c) using any simulation, reproduction, counterfeit, copy or colorable imitation of Vuitton's Registered Trade-Mark 297,594 in connection with the promoting, advertising, display, sale, offering for sale, manufacture, production, circulation or distribution of any product in such fashion as to relate or connect, or tend to relate or connect, such product in any way to Vuitton, or to any goods sold, manufactured, sponsored or approved by, or connected with Vuitton;

(d) making any statement or representation whatsoever, or using any false designation of origin or false description (including, without limitation, any letters or symbols), or performing any act, which can, or is likely to, lead the trade or public, or individual members thereof, to believe that any product manufactured, distributed or sold by them is in any manner associated or connected with Vuitton, or is sold, manufactured, licensed, sponsored, approved or authorized by

Vuitton; and

(e) engaging in any other activity constituting unfair competition with Vuitton, or constituting an infringement of any of Vuitton's trademarks, or of Vuitton's rights in, or to use or to exploit, said trademarks, or constituting any dilution of the Vuitton name, reputation or goodwill; and

(f) assisting, aiding or abetting any other person or business organization from performing or engaging in the acts and activities referred to in paragraphs (a) through (e) above.

Dated: New York, New York
July 28, 1982

/s/ Mary Johnson Lowe
U.S.D.J.

JUDGMENT ENTERED - 7/30/82

/s/ Raymond F. Burghardt
CLERK

The parties and their respective counsel hereby consent to the terms and conditions of the Final Consent Judgment and Permanent Injunction as set forth above and consent to the entry thereof.

REBOUL, MacMURRAY, HEWITT,
MAYNARD & KRISTOL

By /s/ J. Joseph Bainton
A Member of the Firm
Attorneys for Plaintiff
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 841-5700

BRAND & BRAND

By /s/ [illegible] Brand
A Member of the Firm
Attorneys for Defendants
300 Garden City Plaza
Garden City, New York 11530
Telephone: (516) 746-3500

VUITTON ET FILS S.A.

By /s/ J. Joseph Bainton
Authorized Agent

KAREN BAGS, INC.

By /s/ Sol N. Klayminc
President

JADE HANDBAG CO., INC.

By /s/ Sol N. Klayminc
President

JAK HANDBAG INC.

By /s/ Sol N. Klayminc
President

/s/ Sol N. Klayminc
Sol N. Klayminc

/s/ Sylvia Klayminc
Sylvia Klayminc

/s/ Barry Klayminc
Barry Klayminc

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came J. JOSEPH BAINTON, to me known, who, being by me duly sworn, did depose and say that he has full authority to execute this instrument on behalf of Vuitton et Fils S.A., the business organization referred to as plaintiff in this instrument.

/s/ Robert P. Devlin
Notary Public
ROBERT P. DEVLIN
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expires March 30, 1984

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came SOL N. KLAYMINC, to me known, who, being duly sworn, did depose and say that he is the PRESIDENT of KAREN BAGS, INC., and has full authority to execute this instrument on behalf of KAREN BAGS, INC., the business organization referred to as defendant in this instrument.

/s/ Robert P. Devlin
Notary Public
ROBERT P. DEVLIN
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expires March 30, 1984

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came SOL N. KLAYMINC, to me known, who, being duly sworn, did depose and say that he is the PRESIDENT of JADE HANDBAG CO., INC., and has full authority to execute this instrument on behalf of JADE HANDBAG CO., INC., the business organization referred to as defendant in this instrument.

/s/ Robert P. Devlin
Notary Public
ROBERT P. DEVLIN
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expires March 30, 1984

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came SOL N. KLAYMINC, to me known, who, being duly sworn, did depose and say that he is the PRESIDENT of JAK HANDBAG INC., and has full authority to execute this instrument on behalf of JAK HANDBAG INC., the business organization referred to as defendant in this instrument.

/s/ Robert P. Devlin
Notary Public
ROBERT P. DEVLIN
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expires March 30, 1984

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came SOL N. KLAYMINC, to me known, and known to me to be the same person described in and who executed the within instrument, and he duly acknowledged to me that he executed the same.

/s/ Robert P. Devlin
Notary Public
ROBERT P. DEVLIN
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expires March 30, 1984

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came SYLVIA KLAYMINC, to me known, and known to me to be the same person described in and who executed the within instrument, and she duly acknowledged to me that she executed the same.

/s/ Robert P. Devlin
Notary Public
ROBERT P. DEVLIN
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expires March 30, 1984

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

On the 13th day of July, 1982, before me personally came BARRY KLAYMINC, to me known, and known to me to be the same person described in and who executed the within instrument, and he duly acknowledged to me that he executed the same.

/s/ Robert P. Devlin

Notary Public
ROBERT P. DEVLIN
Notary Public, State of New York
No. 31-1720791
Qualified in New York County
Commission Expires March 30, 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, ex rel., :
VUITTON ET FILS S.A., and LOUIS :
VUITTON S.A. :
Plaintiffs, :
-against- :
KAREN BAGS, INC., JADE HANDBAG CO., :
INC., SOL N. KLAYMINC and JAK HANDBAG :
INC., : 78 Civ. 5863 (CLB)
Defendants and Alleged :
Criminal Contemnors, : ORDER TO SHOW
CAUSE
-and- :
BARRY DEAN KLAYMINC, GERALD J. YOUNG, :
GEORGE CARISTE, S.M.E., S.A., CRYSTAL, :
S.A., DAVID ROCHMAN, ROBERT G. :
PARISEAULT, ESQ. and NATHAN HELFAND, :
Additional Alleged :
Criminal Contemnors. :
----- x

Upon the annexed affidavit of J. Joseph Bainton, Esq.,
specially-appointed attorney for the United States of America, and
upon all prior proceedings heretofore and herein, it is hereby

ORDERED that alleged criminal contemnor Sol N. Klayminc
("Klayminc, Sr.") SHOW CAUSE before this Court on May 12, 1983 at 3:00
p.m. or as soon thereafter as counsel can be heard why he should not
be convicted of CIVIL AND CRIMINAL CONTEMPT of this Court's Final
Consent Judgment and Permanent Injunction filed in the underlying
civil action on July 30, 1982 (the "injunction") in violation of 18
U.S.C. § 401(3), by reason of the following acts, each such act
constituting a separate contempt, to wit:

(a) On or about April 1, 1983, Klayminc, Sr., offered to

sell Melvin Weinberg, a government undercover agent using the fictitious name Mel West ("Weinberg") in excess of 1,000 counterfeit Louis Vuitton bags per week to be manufactured by him and his son, alleged criminal contemnor Barry Dean Klayminc ("Klayminc, Jr."), at a factory owned by them in Haiti. Said factory does business under the names of alleged contemnors S.M.E., S.A. and Crystal, S.A.

(b) On or about April 4, 1983, Klayminc, Sr., offered to sell Weinberg the "best" counterfeit Vuitton fabric available.

(c) On or about April 5, 1983, Klayminc, Sr., sold to Weinberg 25 counterfeit Louis Vuitton satchel handbags for \$625.

(d) On or about April 5, 1983, Klayminc, Sr., offered to sell to Weinberg for approximately \$76,000 a 50 per cent interest in the Haiti counterfeit factory, which when placed in full operation would manufacture and sell in excess of 1,000 counterfeit Louis Vuitton handbags per week.

(e) On or about April 14, 1983, Klayminc, Sr., and Weinberg met with alleged criminal contemnor Gerald J. Young ("Young") and reached an agreement with Young to purchase an initial \$45,000 order for 5,000 yards of counterfeit Vuitton material to be used by the Haitian factory to make counterfeit Louis Vuitton merchandise and thereafter to purchase from Young on a regular basis more substantial quantities of counterfeit Louis Vuitton fabric. Such merchandise was to be manufactured in Japan, transshipped to Hong Kong and then shipped into the United States for transfer to Haiti.

(f) On or about April 7, 1983, Klayminc, Sr., arranged for the purchase by Weinberg from alleged criminal contemnor George Cariste ("Cariste") of in excess of 1,000 counterfeit Louis Vuitton bags.

(g) On or about April 14, 1983, Klayminc, Sr., met with alleged criminal contemnor David Rochman ("Rochman") and Weinberg to

discuss purchasing counterfeit Louis Vuitton fabric from Rochman for use in the Haitian operation. Klayminc, Sr., later agreed to purchase such material from Rochman for use in the Haitian operation, as well as finished counterfeit Vuitton goods for resale in the United States.

(h) On or about April 18, 1983, Klayminc, Sr., contracted with Cariste for Cariste to "cut" counterfeit Louis Vuitton fabric furnished by Rochman and to ship such "cut" pieces to his Haitian factory for assembly into counterfeit Vuitton merchandise. Klayminc, Sr., later received such "cut" goods and caused them to be assembled. Klayminc, Sr., willfully engaged in each of the foregoing acts and others with knowledge of the injunction and wanton disregard thereof. It is further

ORDERED that Klayminc, Jr., SHOW CAUSE before this Court on May 12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why he should not be convicted for CIVIL AND CRIMINAL CONTEMPT of the injunction in violation of 18 U.S.C. 401(3), by reason of the following acts, each such act constituting a separate contempt, to wit:

(a) On or about April 17, 1983, Klayminc, Jr., represented to Weinberg that he was fully aware of his father's discussions with Weinberg and that he was intimately involved with his father in establishing the Haitian counterfeiting operation as more fully described above and, further, in the event of his father's untimely demise, that he was ready, willing and able to carry on the counterfeiting operations by himself.

(b) On or about April 20, 1983, Klayminc, Jr., and Cariste met with Weinberg at the Plaza Hotel in New York City and discussed Klayminc, Jr.'s full participation in the Haitian counterfeiting scheme. Klayminc, Jr., engaged in each of the foregoing acts and others with knowledge of the injunction and in wanton disregard

thereof. It is further

ORDERED that alleged criminal contemnor Gerald J. Young SHOW CAUSE before this Court on May 12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why he should not be held in CIVIL AND CRIMINAL CONTEMPT of the injunction in violation of 18 U.S.C. § 401(3), by reason of his offer to sell on or about April 7, 1983, to Klayminc, Sr., and his associates counterfeit Louis Vuitton fabric for use in manufacturing counterfeit Louis Vuitton merchandise notwithstanding his actual knowledge of (a) the existence of the injunction and (b) the fact that Klayminc, Sr., had already been convicted of criminal contempt of the injunction. It is further

ORDERED that Rochman SHOW CAUSE before this Court on May 12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why he should not be convicted of CIVIL AND CRIMINAL CONTEMPT of the injunction in violation of 18 U.S.C. § 401(3), by reason of the following acts, each such act constituting a separate contempt, to wit:

(a) On or about April 14, 1983, Rochman offered to sell Klayminc, Sr., counterfeit Vuitton fabric for use in the Haitian counterfeiting operation.

(b) On or about April 14, 1983, Rochman offered to sell to Weinberg and Klayminc, Sr., over 1,000 completed counterfeit Louis Vuitton articles.

(c) On or about April 15, 1983, Rochman offered to sell to Klayminc, Sr., and Weinberg for \$550,000 apparatus used to manufacture counterfeit Louis Vuitton fabric. Rochman engaged in each of the foregoing acts and others with knowledge of the injunction and in wanton disregard thereof. It is further

ORDERED that alleged criminal contemnor Robert G. Pariseault, Esq. ("Pariseault"), SHOW CAUSE before this Court on May

12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why he should not be convicted of CIVIL AND CRIMINAL CONTEMPT of the injunction in violation of 18 U.S.C. § 401(3), by reason of his offer in or about April, 1983, to sell for \$550,000 to Klayminc, Sr., and Weinberg apparatus used to manufacture counterfeit Louis Vuitton fabric and over 1,000 counterfeit Vuitton articles notwithstanding his actual knowledge of the existence of the injunction. It is further

ORDERED that alleged contemnor Nathan Helfand ("Helfand") SHOW CAUSE before this Court on May 12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why he should not be convicted of CIVIL AND CRIMINAL CONTEMPT of the injunction in violation of 18 U.S.C. § 401(3), by reason of the following acts, each such act constituting a separate contempt, to wit:

(a) In or about March, 1983, Helfand purchased "samples" of counterfeit Louis Vuitton merchandise from Klayminc, Sr., to show Weinberg.

(b) On or about April 1, 1983, Helfand introduced Weinberg to Klayminc, Sr., for the purpose of facilitating Klayminc, Sr.'s sale to Weinberg of substantial quantities of counterfeit Louis Vuitton merchandise.

(c) During March and April, 1983, Helfand aided and abetted Klayminc, Sr., in convincing Weinberg to agree to invest in Klayminc, Sr., and Klayminc, Jr.'s Haitian Louis Vuitton counterfeiting operation. Helfand engaged in each of the foregoing acts with others with actual knowledge of the injunction and in wanton disregard thereof. It is further

ORDERED that alleged criminal contemnor George Cariste ("Cariste") SHOW CAUSE before this Court on May 12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why he should not be convicted of CIVIL AND CRIMINAL CONTEMPT of this Court's Final Consent

Judgment And Permanent Injunction filed in the underlying civil action on July 30, 1982 (the "injunction"), in violation of 18 U.S.C. § 401(3) by reason of the following acts, each such act constituting a separate contempt:

(a) On or about April 5, 1983, Cariste sold to alleged criminal contemnor Sol N. Klayminc ("Klayminc, Sr.") 25 counterfeit Louis Vuitton handbags;

(b) On or about April 7, 1983, Cariste agreed to sell to Klayminc, Sr., in excess of 1,000 ccounterfeit Louis Vuitton handbags; and

(c) On or about April 18, 1983, Cariste contracted with Klayminc, Sr., to "cut" counturfeite Louis Vuitton fabric furnished by alleged criminal contemnor David Rochman and to ship such "cut" pieces to Klayminc's Haitian factory for assembly into counterfeit goods. Cariste later shipped such "cut" goods to Klayminc, Sr. in Haiti. Cariste wilfully engaged in each of the foregoing acts and others with knowledge of the injunction in wanton disregard thereof.

ORDERED that each of the aforesaid alleged criminal contemnors SHOW CAUSE before this Court on May 12, 1983, at 3:00 p.m. or as soon thereafter as counsel can be heard why they should not be convicted of CIVIL AND CRIMINAL CONTEMPT in violation of 18 U.S.C. § 401(3) by reason of their aforesaid conduct in concert and participation with Klayminc, Sr., in knowing violation of the injunction.

ORDERED that any United States Marshal or any other authorized officer seize from the following locations:

- (1) 91 Buckingham Avenue
Perth Amboy, New Jersey
- (2) 503 Division Street
Perth Amboy, New Jersey
- (3) 180 Clinton Street
Woodbridge, New Jersey

- (4) Encore Handbags
73 Daggett Street
New Haven, Connecticut
- (5) Borsetta Fashion Handbags
73 Daggett Street
New Haven, Connecticut; and
- (6) LaFila
1031 South Broadway
Suite 804
Los Angeles, California
- (7) Bruin Plastic Co., Inc.
Main Street
Glendale, Rhode Island

the things listed below:

- (a) all simulations, reproductions, counterfeits, copies or colorable imitations of Registered Trade-Mark 297,594 of Louis Vuitton S.A. ("Vuitton"), including handbags, luggage, material and other merchandise bearing reproduction of said trademark;
- (b) all labels, signs, prints, packages wrappers, receptacles and advertisements bearing any simulation, reproduction, copy or colorable imitation of Vuitton's Registered Trade-Mark 297,594;
- (c) all plates, molds, machines and other means of making said simulations, reproductions, counterfeits, copies or colorable imitations of Vuitton's Registered Trade-Mark 297,549 [sic];
- (d) all books and records relating to the manufacture, distribution, offering for sale and sale of said simulations, reproductions, counterfeits, copies or colorable imitations of Vuitton's Registered Trade-Mark 297,594 and
- (e) all other property (i) constituting evidence of conduct which is criminally contumacious of the Final Consent Judgment and Permanent Injunction, filed with the Clerk of the United States District Court for the Southern District Court for the Southern District of New York on July 30, 1962, in the underlying civil action

in the above-captioned proceeding, or (ii) designed or intended for use on which is or has been used as the means of committing said criminal contempt, and as I am satisfied that there is probable cause to believe that the property so fitted and intended to be used is being concealed on the premises above described.

Dated: New York, New York
April 29, 1983

/s/ Charles L. Brieant
U.S.D.J.

MAY 6 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

GERALD J. YOUNG, et al.,

Petitioners,

—against—

U.S.A. ex rel. VUITTON ET FILS S.A., et al.,

Respondent.

BARRY DEAN KLAYMINC,

Petitioner,

—against—

U.S.A. ex rel. VUITTON ET FILS S.A., et al.,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

J. JOSEPH BAINTON
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 841-5700
Attorney for Respondent

ROBERT P. DEVLIN

STEVEN H. REISBERG

JOSEPH J. IAROCCI,

REBOUL, MacMURRAY, HEWITT,
MAYNARD & KRISTOL

Of Counsel.

May 5, 1986

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Questions Presented

1. Whether the appointment by the District Court of opposing counsel to prosecute a criminal contempt proceeding pursuant to Fed. R. Crim. P. 42(b) violated petitioners' rights under the due process clause of the Fifth Amendment.
2. Whether a District Court may authorize a private attorney appointed pursuant to Fed. R. Crim. P. 42(b) to continue an ongoing investigation in order to obtain additional evidence to be used in the criminal contempt trial.
3. Whether the Court of Appeals erred in affirming the criminal contempt sentences of the five petitioners which ranged from six months to five years.



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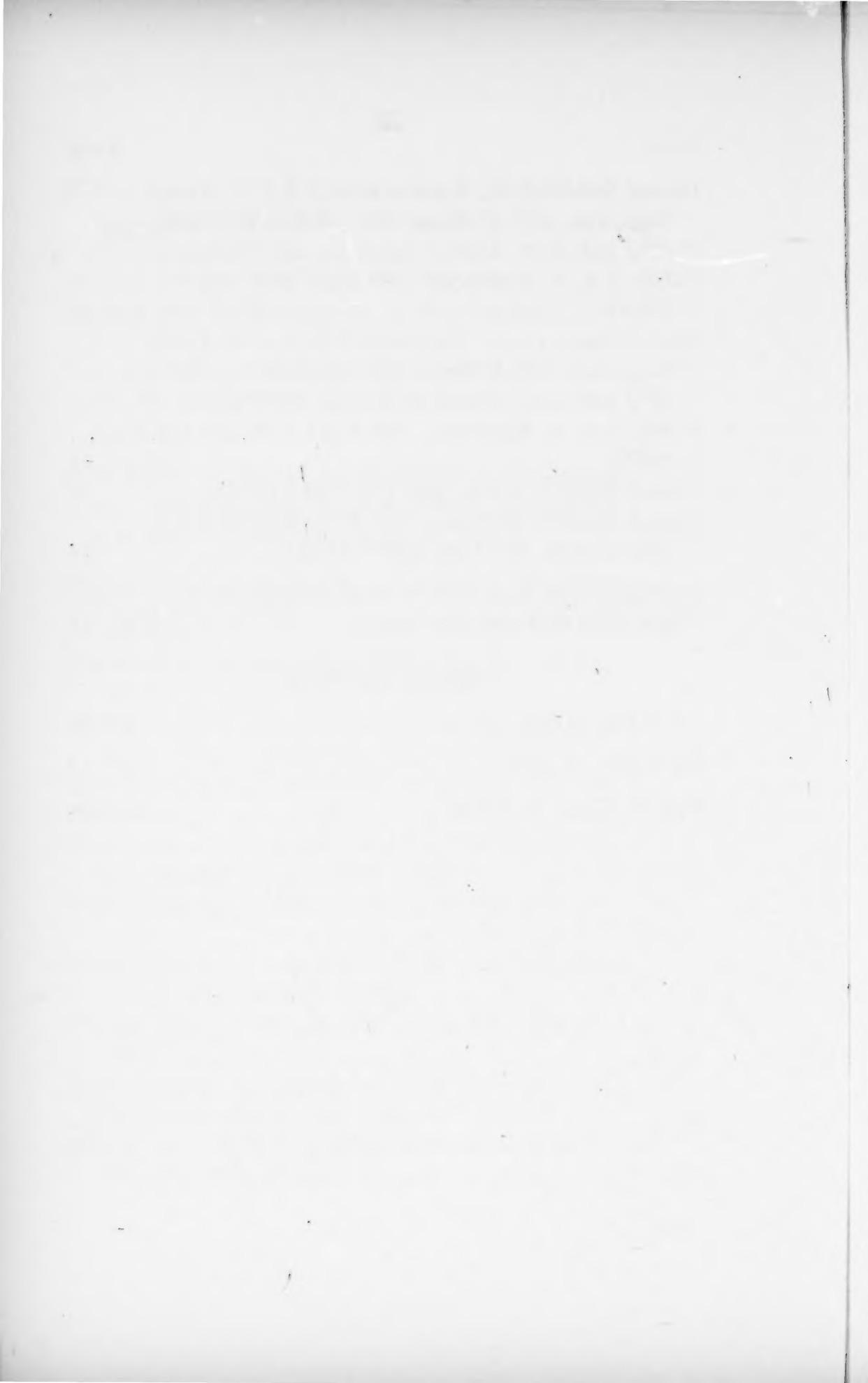
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IN THE
Supreme Court of the United States

October Term, 1985

Nos. 85-1329 and 85-6207

GERALD J. YOUNG, *et al.*,

Petitioners,

—against—

U.S.A. *ex rel.* VUITTON ET FILS S.A., *et al.*,

Respondent.

BARRY DEAN KLAYMINC,

Petitioner,

—against—

U.S.A. *ex rel.* VUITTON ET FILS S.A., *et al.*,

Respondent.

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

BRIEF OF RESPONDENT IN OPPOSITION

Respondent respectfully prays that the joint petition filed by Gerald J. Young, George Cariste, Sol N. Klayminc and Nathan Helfand, No. 85-1329, and the petition filed by Barry Dean Klayminc, No. 85-6207, for writs of certiorari

to the United States Court of Appeals for the Second Circuit
be denied.¹

Statement of the Case

Petitioner Sol N. Klayminc is attempting to avoid the consequences of his second conviction for criminal contempt. On December 12, 1978, Sol Klayminc consented to the entry of a preliminary injunction which enjoined him (and others named) from trafficking in counterfeit Vuitton merchandise.² (A 3)³ In July, 1981, Vuitton learned that Sol Klayminc, through his family-owned companies, Karen Bags, Inc. ("Karen Bags") and Jade Handbag Co. ("Jade"), together with other persons, were continuing to offer for sale and to sell counterfeit Vuitton products in violation of the preliminary injunction. This led to Sol Klayminc's first prosecution for criminal contempt.⁴

The District Court directed that the first contempt be referred to a magistrate for trial as a petty offense. At the

¹ Vuitton et Fils S.A. and Louis Vuitton S.A. are now a single company, called Louis Vuitton ("Vuitton"), which is organized under the laws of the Republic of France. Vuitton has a number of affiliates, none of which are publicly traded. Vuitton has no other related corporate entities that would be required to be set forth pursuant to Rule 28.1.

² Vuitton is a leading manufacturer of luggage and other related goods and its trademark, consisting of a design using the letters "L" and "V" superimposed upon one another, is recorded on the Principal Trademark Register of the United States Patent Office as Registered Trademark 297,594.

³ Citation is to the appendices of petition No. 85-6207.

⁴ On July 8, 1981, the District Court appointed J. Joseph Bainton, Esq., Vuitton's attorney, pursuant to Fed. R. Crim. P. 42(b), to prosecute Sol Klayminc and others for alleged criminal contempt. On July 10, 1981, United States Marshals seized three truckloads of counterfeit Vuitton goods from the business premises of Sol Klayminc's family-owned companies.

conclusion of the trial, Sol Klayminc, Karen Bags and Jade were convicted of criminal contempt. Sol Klayminc received a suspended sentence and was placed on unsupervised probation for one year. During this period of probation, Sol Klayminc committed the acts that resulted in his second conviction for criminal contempt. His appeal from this second contempt conviction is the subject of his petition to this Court.

On July 30, 1982, the underlying civil action was settled upon the terms that Sol Klayminc, Barry Klayminc, Sylvia Klayminc and their affiliated companies agreed to the entry of a permanent injunction and the payment to Vuitton of \$100,000.

In early 1983, Vuitton, along with several other trademark owners, was contacted by Kanner Security Group, Inc. ("Kanner"), a Florida private investigation firm, and invited to participate in a private investigation intended to identify persons trafficking in counterfeit goods. As part of the investigation, Kanner personnel, many of whom are former FBI agents, were to pose as persons interested in trading in counterfeit trademarked merchandise on a large scale. Vuitton decided to participate in the Kanner private investigation as part of its general trademark enforcement program.

During the course of the investigation, Kanner's agents met petitioner Nathan Helfand. Helfand arranged for Kanner investigators to purchase a variety of counterfeit trademarked goods. Helfand also introduced Kanner agents to Sol Klayminc and identified him as a good source for counterfeit Vuitton goods.

Vuitton learned, through the Kanner investigation, that Sol Klayminc told petitioner Helfand that Klayminc "had been burned by Louis Vuitton to the tune of \$100,000 in

New York City" (R 611),⁵ but was still in the business of selling counterfeit Vuitton goods. During a meeting on March 27, 1983, petitioners Helfand and Sol Klayminc also prepared a handwritten memorandum that set forth in some detail their plans to use a factory in Haiti to produce large quantities of counterfeit Vuitton goods. (R 644-645) This memorandum was given to one of the Kanner investigators. Sol Klayminc also delivered to Helfand several counterfeit Vuitton articles. (R 613)

On March 30, 1983, on the basis of information from the private investigation, Vuitton applied to the District Court for an order pursuant to Fed. R. Crim. P. 42(b) specially appointing its attorneys, J. Joseph Bainton, Esq., and Robert P. Devlin, Esq., to investigate further and thereafter to prosecute petitioners Sol Klayminc, Barry Klayminc, Nathan Helfand, George Cariste and others, whose actual identities were then unknown, for criminal contempt. In an affidavit submitted to the District Court, Mr. Bainton fully informed the District Court of the prior proceedings against Sol Klayminc, and described in detail the facts uncovered in the Kanner investigation which implicated Sol Klayminc and certain other petitioners. (R 610-615)

On the basis of the facts set forth, the District Court (Lasker, J.) concluded that it was proper to appoint Messrs. Bainton and Devlin pursuant to Fed. R. Crim. P. 42(b) to prosecute the alleged criminal contempt. The District Court specifically held that "probable cause exists to believe that [Sol Klayminc, Barry Klayminc, George Cariste and others] are knowingly engaged in a course of conduct

⁵ Citations to the Joint Appendix of Appellants and the Supplemental Appendix of Appellee on appeal to the Court of Appeals are in the form "R [page]".

criminally contumacious of this Court's final consent judgment and permanent injunction filed July 30, 1982 . . ." (R 604-605). The District Court also authorized Messrs. Bainton and Devlin to continue their investigation of the alleged counterfeiting scheme. The principal benefit of the District Court's authorization of the investigation was that many of the conversations between the private investigators and the petitioners were recorded on audio-tape or video-tape. This allowed Messrs. Bainton and Devlin to "define more fully the boundaries of an already well developed contempt." *United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc.*, 592 F. Supp. 734 (S.D.N.Y. 1984) ("*Vuitton I*").

On April 6, 1983, Messrs. Bainton and Devlin appeared before Judge Brieant, to whom the case had been assigned, and as requested by Judge Lasker, advised Judge Brieant of the order of appointment.⁶ Mr. Bainton also informed the District Court of the most recent developments in the investigation, and that the investigators had arranged to meet with a source for counterfeit Vuitton fabric the following week in California. (R 660-661) Judge Brieant requested that Mr. Bainton fully inform the United States Attorney's office in New York of the information received. (R 662)

Mr. Bainton brought this proceeding to the attention of Lawrence Pedowitz, Chief, Criminal Division, Office of the United States Attorney for the Southern District of New York. (A 664) The United States Attorney's office was fully informed of the Rule 42(b) appointment and was free to take whatever role it chose in the prosecution and the continued investigation. Mr. Pedowitz chose not to

⁶ The application for the special appointment had been made before Judge Lasker because at the time of the application, Judge Brieant, to whom the case had been assigned, was out of the district.

take an active role and simply wished Mr. Bainton good luck. (A 6) Mr. Bainton also discussed the case with John Kildebeck, Head Deputy District Attorney for the County of Los Angeles. Mr. Bainton informed him of his appointment as a special prosecutor and, pursuant to Mr. Kildebeck's request, that portion of the investigation that was conducted in California was done under the direction of the District Attorney's office. (R 665)

On April 26, 1983, the District Court made the decision to sign the Order to Show Cause charging petitioners with criminal contempt, and directed the prosecution of the criminal contempts to go forward. (R 667) Petitioners' pre-trial motions were considered and denied by the District Court in *Vuitton I*, 592 F. Supp. 734 (S.D.N.Y. 1984). A jury found the petitioners guilty of criminal contempt following a nine-day trial. The District Court considered and denied petitioners' post-trial motions in *United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc.*, 602 F. Supp. 1052 (S.D.N.Y. 1985) ("Vuitton II"). The Court of Appeals affirmed the convictions in an opinion reported at 780 F.2d 179 (2d Cir. 1985), and these petitions for writs of certiorari were thereafter filed.

Reasons for Denying the Writs

I.

The Appointment of Opposing Counsel to Prosecute a Criminal Contempt Is Expressly Authorized by Fed. R. Crim. P. 42(b) and Prior Judicial Practice.

Petitioners ask this Court to restrict the discretion of the District Court as to the identity of the attorney whom the District Court may appoint to prosecute a criminal contempt. Rule 42(b) of the Federal Rules of Criminal Procedure⁷ provides in pertinent part as follows:

“A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney *or of an attorney appointed by the court for that purpose*, by an order to show cause or an order of arrest”

Fed. R. Crim. P. 42(b) (emphasis supplied). In this case, the District Court invoked the authority of Rule 42(b) to appoint two private attorneys to prosecute a criminal contempt arising out of petitioners' alleged violation of a permanent injunction prohibiting them from trafficking in counterfeit goods. Petitioners would have this Court amend Rule 42(b) so as to forbid the District Court from appoint-

⁷ Fed. R. Crim P. 42(a) provides that the judge may punish summarily a criminal contempt if the conduct constituting the contempt was committed in the presence of the court.

ing the attorneys for the party in the underlying civil suit as special prosecutors for the criminal contempt proceeding.

The *per se* prohibition upon the District Court sought by petitioners would effectively remove any reasonable likelihood that the criminal contempts of these petitioners, or any other persons similarly situated, would be prosecuted. Under petitioners' argument, the District Court would be required to select counsel unrelated to the party who obtained the underlying civil injunction, or to rely upon the availability of staff from the United States Attorney's office. The Second Circuit in *Musidor, B.V. v. Great American Screen*, 658 F.2d 60 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982), rejected arguments identical to those asserted here. That court explained:

"The practicalities of the situation—when the criminal contempt occurs outside the presence of the court but in civil litigation—require that the court be permitted to appoint counsel for the opposing party to prosecute the contempt. There is no fund out of which to pay other counsel in such an event, nor would it be proper that he be paid by the opposing party. This is not the kind of case for which legal aid societies or public defenders are available."

658 F.2d at 65. The unavailability of any fund to pay private attorneys to prosecute criminal contempts, or even to reimburse them for their out-of-pocket costs, renders petitioners' proposal unworkable.

Similarly, exclusive reliance upon the United States Attorney's office is neither practical nor contemplated by Rule 42(b). As the District Court noted, the "offices of the United States Attorneys throughout the nation are already overburdened by those civil and criminal matters for which they have exclusive responsibility . . . [and] the special

appointment procedure provided for in Rule 42 provides a fair and efficient method of vindicating 'the public interest in orderly government [which] demands respect for compliance with court mandates,' *United States v. Petito*, 671 F.2d 68, 72 (2d Cir.), cert. denied, 459 U.S. 824 (1982), and protecting the interests of civil plaintiffs like Vuitton." *Vuitton I*, 592 F. Supp. at 744 (footnote omitted). In the instant case, Mr. Pedowitz, Chief of the Criminal Division of the Office of the United States Attorney for the Southern District of New York, was fully informed of the Rule 42(b) appointment and his office could have participated in the prosecution to whatever degree believed appropriate. The United States Attorney's office chose not to take an active role and allowed the matter to be handled by the specially appointed private attorneys.

The Second Circuit noted that "[t]he practice of appointing [opposing] counsel as prosecutor has a long history in this circuit." (A 8) In *McCann v. New York Stock Exchange*, 80 F.2d 211, 214 (2d Cir. 1935), cert. denied, 299 U.S. 603 (1936), a case which predates Rule 42(b), Judge Learned Hand noted both the availability and necessity of the appointment of opposing counsel, explaining:

"But the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should"

80 F.2d at 214. The Advisory Committee On Proposed Rules was well aware of the *McCann* decision at the time Rule 42(b) was drafted. Fed. R. Crim. P. 42(b) (Advisory Committee's notes); see *Musidor*, 658 F.2d at 64.

Per se disqualification of a party's counsel is not necessary to secure constitutional protections. No violation of petitioners' right to due process occurred in this case. (A 8)

As the Second Circuit below held, “[p]rosecutors appointed under Fed. R. Crim. P. 42(b) are particularly susceptible of judicial control.” (A 10) First, the District Court decides whether or not to appoint a particular attorney as a special prosecutor. Second, the District Court, not the special prosecutor, ultimately decides whether to proceed with the contempt prosecution. Third, the defendants are able to move at any time for the disqualification of the attorney appointed, as they did here, and have the District Court reconsider the propriety of the appointment, or review any alleged prosecutorial misconduct.⁸ Fourth, supervision of the special prosecutor is provided during the course of the trial by the District Court itself. As the Second Circuit noted, “Judge Brieant conducted the proceedings and the trial with a sharp eye toward ensuring that appellants were ‘accorded all the protections given to other criminal defendants.’ [citation omitted].” (A 10)

The petitioners’ heavy reliance upon *Polo Fashions, Inc. v. Stock Buyers International, Inc.*, 760 F.2d 698 (6th Cir. 1985), *petition for cert. filed*, No. 85-455 (Sept. 17, 1985) (“*Polo*”), is misplaced. The *Polo* court did not hold that counsel for a party in an underlying civil litigation was prohibited from being appointed to participate in the prosecution of a criminal contempt. Instead, the *Polo* court, as a matter of its supervisory authority,⁹ held that opposing counsel “could assist the United States Attorney” in the

⁸ In the instant case, for example, petitioners alleged that Messrs. Bainton and Devlin should have been disqualified because, *inter alia*, Sol Klayminc brought a suit for slander against Mr. Bainton following Sol Klayminc’s first criminal contempt conviction. This claim was rejected by the Court of Appeals and the District Court, both of which noted that the “suit was clearly frivolous; it was never pressed, and was finally dismissed by consent.” (A 10; see C 21)

⁹ The *Polo* court was careful to note that it did not decide that the appointment of opposing counsel as a special prosecutor would constitute any due process violation. 760 F.2d at 704.

prosecution of the contempt, "but could not proceed alone." 760 F.2d at 704. The *Polo* court also held that where "the United States Attorney should decline to prosecute upon request, then the district court may appoint one or more disinterested attorneys to do so." 760 F.2d at 705. When a disinterested attorney is appointed, however, "again, counsel for an interested party may be appointed to assist." *Id.*

Both the Sixth Circuit and the Second Circuit clearly recognize that securing the prosecution of those who willfully violate civil injunctions requires that the private attorneys who obtained the injunction be allowed to participate in the prosecution of the criminal contempt. The two Circuits differ in that the Second Circuit has placed its reliance upon the District Court to exercise its discretion concerning the appointment of counsel and the supervision of the prosecution of the contempt. The Sixth Circuit has sought to supplement such control by requiring the additional involvement of a "neutral attorney" as a co-prosecutor.¹⁰

The other alleged conflicts among the Courts of Appeal relied upon by petitioners are even more tenuous. The Fifth Circuit's decision in *Brotherhood of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312 (5th Cir. 1969), held that the contempt judgment be vacated because "we conclude that the proceedings did not meet the demands of due process as to notice and time." 411 F.2d at 317-18 (footnote omitted). Although strong *dictum* in that case stated that criminal contempt proceedings must be in the sole control of the United States Attorney (411 F.2d at 319), the Fifth Circuit recently avoided ruling on the con-

¹⁰ It should be noted, however, that as a practical matter, the *Polo* decision will serve to impede substantially the availability of criminal contempt prosecutions, because the *Polo* court has not solved the problem of there being no fund or other means to compensate the required neutral attorney.

tinued validity of this *dictum*. *United States v. McKenzie*, 735 F.2d 907, 910 n.11 (5th Cir. 1984). Similarly, in *Midway Manufacturing Co. v. Kruckenberg*, 779 F.2d 624 (11th Cir. 1986), the Court also expressly declined "to decide the issue of whether there is a plenary rule forbidding in all criminal cases appointment of opposing counsel as prosecutors", and instead ordered a remand with instructions to the District Court to hold a hearing to determine whether "under the particular facts and circumstances of this case [the] appointment was appropriate." 779 F.2d at 626.

The other two cases upon which petitioners rely are inapposite because neither addresses the propriety of a special appointment. Rather, each of those cases only holds that the decision to initiate a criminal contempt proceeding belongs to the District Court alone, and that a civil party may not appeal from the refusal of the District Court to initiate such proceedings. See *Ramos Colon v. United States Attorney*, 576 F.2d 1, 5 (1st Cir. 1978); *Kienle v. Jewel Tea Co.*, 222 F.2d 98, 100 (7th Cir. 1955).

The District Court has always had the authority to punish, by criminal fine or imprisonment, contempt of its authority. See 18 U.S.C. § 401(3); 28 U.S.C. § 1651; *United States v. Gracia*, 755 F.2d 984, 988 (2d Cir. 1985); *Vuitton et Fils S.A. v. J. Young Enterprises, Inc.*, 644 F.2d 769, 779 (9th Cir. 1981); *Vuitton I*, 592 F. Supp. at 739-41.¹¹ The District Court decides whether to allow

¹¹ 18 U.S.C. § 401 provides as follows:

"§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(footnote continued on following page)

the initiation of a contempt prosecution as a matter of its authority, and the proceeding remains uniquely subject to its control.

A civil injunction is more than a promise by the defendant to respect the legal rights of another; it is an order of a United States Court. The availability to the District Court of private attorneys, in addition to the United States Attorney, to prosecute criminal contempts under Rule 42(b) is essential to secure the prosecution of violations of civil injunctions. The Second Circuit's affirmation of the right of a District Court to appoint private attorneys to prosecute violations of its orders by means of criminal contempt proceedings is proper, and does not provide any grounds for review by this Court.

II.

The District Court's Authorization of a Limited Continuation of an Investigation Does Not Present a Ground for Granting Review.

Vuitton was engaged in a lawful private investigation during which it learned that Sol Klayminc, while still on probation from his first criminal contempt conviction, and

(footnote continued from preceding page)

- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, decree, or command."

Petitioners contend that Rule 42(b) is only a notice provision and assert that there is no statutory authorization for a private attorney to prosecute a criminal contempt. Petition No. 85-6207 at 15-16. The presence of express statutory authorization under both 18 U.S.C. § 401 and 28 U.S.C. § 1651 renders petitioners' contentions without merit. *See J. Young Enterprises*, 644 F.2d at 779. Nor does the District Court's power to prosecute criminal contempts violate the separation of powers. *Gracia*, 755 F.2d at 988.

other petitioners were trafficking in counterfeit Vuitton goods in violation of a permanent injunction. Vuitton brought this information to the attention of the District Court on March 30, 1983. At that time, Vuitton requested appointment of its counsel under Rule 42(b) to prosecute the criminal contempt and also authorization to allow the investigation to go forward in order to secure additional evidence and to identify other participants in the counterfeiting scheme.

Vuitton could have delayed its Rule 42(b) request until April 26, 1983, and then moved both to be appointed under Rule 42(b) and to serve the petitioners the Order to Show Cause with notice of their criminal contempts. The sole advantage of the District Court's approval of continuation of the investigation under Rule 42(b) was that it allowed many of the telephone conversations and meetings between investigators and the petitioners to be recorded.¹² In the absence of such authorization, the primary evidence at trial would have been the testimony of the investigators. The availability of the recordings allowed petitioners to be convicted based upon evidence "out of their own mouths . . ." *Vuitton II*, 602 F. Supp. at 1056, 1058. Cf. *United States v. Williams*, 705 F.2d 603 (2d Cir.), cert. denied, 464 U.S. 1007 (1983).

To date, the Second Circuit is the only court to consider the propriety of authorizing a post-appointment investigation. Since no other court has yet considered this question,

¹² The recordings were conducted by or with the consent of the investigator who participated in the conversation or meeting. Court authorization was requested because it could be unethical for an attorney to participate in the recording of a conversation without the consent of all participants. No similar ethical prohibition applies to prosecutors, and there is no Constitutional issue raised by the use of such procedures. See *United States v. White*, 401 U.S. 745, 749-51 (1971).

the request for this Court to review this issue should be denied. *See McCray v. New York*, 461 U.S. 961 (1983) (Stevens, J.).

III.

This Court Should Not Review the Sentences Imposed.

The sentences imposed, in the words of the Second Circuit, "reflect a range of punishment that comports with each defendant's culpability." (A 15) This Court has instructed that, because there is no statutory limit upon a District Court's sentencing power in cases of criminal contempt, appellate courts have "a special responsibility for determining that the power is not abused." *Green v. United States*, 356 U.S. 165, 188 (1958), *partially overruled on other grounds*, *Bloom v. Illinois*, 391 U.S. 194 (1968). *See United States v. Gracia*, 755 F.2d 984, 988 (2d Cir. 1985). This Court has also stated that, in imposing a penalty for criminal contempt, the District Court could properly consider (i) "the extent of the willful and deliberate defiance of the court's order", (ii) "the seriousness of the consequences of the contumacious behavior", (iii) "the necessity of effectively terminating the defendant's defiance as required by the public interest", and (iv) "the importance of deterring such acts in the future." *United States v. United Mine Workers of America*, 330 U.S. 258, 303 (1947). *See Gracia*, 755 F.2d at 990; *United States v. Rauch*, 717 F.2d 448, 450-51 (8th Cir. 1983). The District Court carefully exercised its responsibilities and the Court of Appeals properly affirmed holding that "[i]n light of the defendants' deliberate flaunting of the law over an extended period of time and in light of their calculated acts in violation of the court's injunction, the sentences are not excessive." (A 15-16)

The sentences imposed by the District Court set forth a range of punishment whereby those who knowingly and willfully violated the court orders were dealt with severely and those whose culpability was less, who demonstrated contrition, and who cooperated with the government in the prosecution of others, avoided incarceration. The sentences imposed are neither excessive nor disproportionate and are fully within the discretion entrusted to the District Court. *See, e.g., United States v. Brummitt*, 665 F.2d 521, 526 (5th Cir. 1981), cert. denied, 456 U.S. 977 (1982) (five year sentence); *United States v. Berardelli*, 565 F.2d 24, 30-31 (2d Cir. 1977) (five year sentence); *United States v. Thompson*, 214 F.2d 545 (2d Cir.), cert. denied, 348 U.S. 841 (1954), (four year sentence); *United States v. Hall*, 198 F.2d 726 (2d Cir. 1952), cert. denied, 345 U.S. 905 (1953) (three year sentence).

Sol Klayminc, whom the District Court found to be "the principal malefactor" (R 241), and who committed the crime while on probation for his prior conviction (R 240), was sentenced to five years imprisonment. Young, "a principal factor in the plan" because he was to supply the counterfeit fabric from his source in Japan, and who had willfully violated the preliminary injunction entered against him by order of the Court of Appeals in *Vuitton et Fils S.A. v. J. Young Enterprises, Inc.*, 644 F.2d 769, 778-79 (9th Cir. 1981), was sentenced to two and one-half years imprisonment. (R 241-242) Barry Klayminc, who had consented to the 1982 injunction, but nevertheless assisted his father in the criminal enterprise (*see Vuitton II*, 602 F. Supp. at 1066-1068), was sentenced to nine months imprisonment. The District Court specifically noted in Barry Klayminc's case that he had "a lesser culpability . . . in part [because] of his loyalty and faith to his own father . . ." (R 242) Cariste, who actively participated

in the plan by, among other acts, delivering 25 counterfeit bags and cutting components for 50 others, was also sentenced to nine months imprisonment. (R 243) Helfand, who helped to arrange the April 5, 1983, meeting between petitioner Sol Klayminc and the Kanner private investigator and who continued to be an active participant in the intentional violations of the injunction, the Court found "less culpable" than the other defendants and was sentenced to six months imprisonment. (R 242)

The final two defendants sentenced by the District Court were Robert Pariseault and David Rochman (neither is a petitioner here). Both of these defendants pleaded guilty and thereafter actively cooperated. The Court noted that "[b]oth those cases are characterized by contrition and a modest amount of cooperation" (R 208), and these two defendants were given suspended sentences and placed on probation.

In sum, the sentences imposed by the District Court were well within its discretion, were properly affirmed by the Court of Appeals, and provide no grounds for review by this Court.

Conclusion

The petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit present no adequate grounds for review and should be denied.

Dated: May 5, 1986

Respectfully submitted,

J. JOSEPH BAINTON
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 841-5700

Attorney for Respondent

ROBERT P. DEVLIN
STEVEN H. REISBERG
JOSEPH J. IAROCCI,

REBOUL, MacMURRAY, HEWITT,
MAYNARD & KRISTOL

Of Counsel.

Nos. 85-1329 and 85-6207

Supreme Court, U.S.
E I L E D

SEP 8 1986

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

GERALD J. YOUNG, GEORGE CARISTE, SOL N. KLAYMINC,
and NATHAN HELFAND, PETITIONERS

v.

U.S.A., *ex rel.*
VUITTON ET FILS S.A., ET AL., RESPONDENTS

BARRY DEAN KLAYMINC, PETITIONER

v.

U.S.A., *ex rel.*
VUITTON ET FILS S.A., ET AL., RESPONDENTS

On Writs of Certiorari to the United States
Court of Appeals for the Second Circuit

JOINT APPENDIX

JAMES A. COHEN
WASHINGTON SQUARE LEGAL
SERVICES, INC.
715 Broadway, 4th Floor
New York, NY 10003
(212) 505-7400
Counsel for Petitioner
Barry Dean Klaymine

J. JOSEPH BANTON
RCBOUL, MACMURRAY, HEWITT,
MAYNARD & KRISTOL
45 Rockefeller Plaza
New York, NY 10020
(212) 841-5700
Counsel for Respondent

(Additional Counsel Listed on Inside Cover)

PETITION FOR CERTIORARI FILED IN 85-1329 FEBRUARY 6, 1986
PETITION FOR CERTIORARI FILED IN 85-6207 JANUARY 16, 1986
CERTIORARI GRANTED JUNE 23, 1986

192 PM

LEONARD J. COMDEN
WASSERMAN, COMDEN & CASSELMAN
5567 Reseda Blvd.
Suite 330
Tarzana, CA 91356
(818) 705-6800

Counsel for Petitioner
Gerald Young

MITCHEL B. CRANER
666 Fifth Avenue
13th Floor
New York, NY 10103
(212) 757-9350

Counsel for Petitioner
George Cariste

WILLIAM WEININGER
845 Third Avenue
New York, NY 10022
(212) 308-3767

Counsel for Petitioner
Sol Klayminc

THOMAS R. MATARAZZO
4009 Fifth Avenue
Brooklyn, NY 11232
(718) 853-4040

Counsel for Petitioner
Nathan Helfand

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The opinions of the court of appeals and of the district court are printed in the appendix to the petition for a writ of certiorari in No. 85-1329 and have not been reproduced here.



**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

- March 31, 1983—Order Appointing Counsel and Approving Certain Investigatory Measures, Lasker, J. filed.
- April 26, 1983—Order to Show Cause why Sol N. Klayminc, Barry Dean Klayminc, Gerald J. Young, David Rochman, Robert G. Pariseault and Nathan Helfand should not be held in criminal contempt filed.
- July 11, 1983—Motion filed for severance of defendant Rochman.
- July 11, 1983—Motion filed to dismiss Order to Show Cause.
- July 11, 1983—Motion filed to transfer case for trial.
- July 15, 1983—Notice of Motion for an Order dismissing the Order to Show Cause as to additional alleged contemnor George Cariste upon the ground and for the reason that said Order to Show Cause dated April 29, 1983 is without sufficient cause and affidavit in support filed by attorney for Cariste (filed in 78 Civ. 5863 CLB).
- July 15, 1983—Search Warrant to search Criminal Contemnors Barry Dean Klayminc, et al., filed.
- August 12, 1983—Notice of Motion for an Order revoking appointment of the Special Prosecutor and dismissing the Order to Show Cause filed by attorney for Barry Dean Klayminc.
- August 15, 1983—Notice of Motion for an Order revoking appointment of Joseph Bainton and Robert Devlin and the law firm of Reboul, MacMurray, Hewitt, Maynard & Kristol as Special Prosecutors, dismissing the Order to Show Cause and suppressing all tapes, documents, recordings, etc., filed by defendant Klayminc.
- August 15, 1983—Affidavit of attorney Thomas Matarazzo in support of the motion of additional contemnor Helfand for an Order Dismissing the Order to Show Cause.

September 2, 1983—Memorandum of Law in support of alleged contemnors' motion to revoke the appointment of the special prosecution and dismiss the Order to Show Cause filed by attorney for Klaymine, additional alleged contemnor.

September 7, 1983—Memorandum of Law in support of defendant and alleged criminal contemnor Robert G. Pariseault's motion for an order revoking the special prosecutor's appointment, dismissing the Order to Show Cause, and suppressing all physical evidence.

September 30, 1983—Memo of the Government in Opposition to Various Pre-Trial Motions by alleged criminal contemnors, and Appendix volumes #1 and #2, filed.

October 24, 1983—Reply to Memo of the Government in Opposition to various Pretrial Motions by alleged criminal contemnors filed by defendant Barry Klaymine.

October 27, 1983—Filed Response to Government's Opposition to Motion to dismiss by Defendant David Rochman.

January 4, 1984—Filed Notice of Motion for an Order Dismissing the Order to Show Cause for failure to present the subject matter to the grand jury by Attorney for Barry Klaymine.

January 23, 1984—Filed Memorandum of Law submitted by the government in opposition to defendant Barry Klaymine's application for an order dismissing charges against him.

March 7, 1984—Filed letter to Judge Brieant requesting the removal of special prosecutors Bainton and Devlin, from James A. Cohen.

May 29, 1984—Filed memo of the Govt Addressed to the Extraterritorial application of the Permanent injunction from which this action arises.

May 29, 1984—Filed letter to Judge Brieant from James A. Cohen to begin trial on May 15 or 16.

May 29, 1984—Filed letters dated May 4 and May 7, 1984 to Judge Brieant from William Weininger for Klaymine requesting that certain comments be raised.

May 29, 1984—Endorsements on the back of Order to Show Cause dated 5-4-84; JAN 13, 1983: Speedy trial act excluded because of the Co-Defendants 6-13-83 . . . Defendants Klayminc, Pariseault, present, plead not guilty, ROR, Sp time stopped, Motions Ret. 9-12-83 at 4 P.M. . . . 5-10-84 Defendant Pariseault Motion for adjourn trial as to him is granted to the extent that he is severed because of the fact that he has to obtain new counsel . . . 5-14-84 Defendants Klayminc, Young and Helfand appear . . . testimony begins and Government's case goes forward as to those present on criminal contempt of court . . . 5-15-84 Trial Cont'd Govt's case resumes . . . 5-16-84 Trial Cont'd Govt's case resumes . . . 5-17-84 Trial Cont'd Govt's case resumes . . . 5-18-84 Trial Cont'd Govt's case resumes . . . 5-21-84 Trial Cont'd Defendant Cariste's motions to dismiss are denied. . . . 5-22-84 Trial Cont'd . . . 5-23-84 Trial cont'd . . . 5-24-84 Trial Cont'd Jury returns and resumes its deliberation and returns verdict of guilty as to defendants Klayminc, Cariste, Young, Helfand, Mather, P.S.I. for all defendants . . . Klayminc, Helfand, Cariste sentence adjourned to 7-30-84 Young's sentence adjourned to 9-4-84. All defendants ROR, BAIL LIMITS INCLUDE continental U.S.A. Trial concluded, Jury Discharged, BRIEANT J.

June 6, 1984—Letter to Judge Brieant from Attorney James Cohen explaining that he attempts to do the following: (1) the motion for a judgment of acquittal pursuant to Rule 29(c) of the F.R.C.P. will be made . . . (2) A motion to dismiss for the due process violations

July 23, 1984—Filed Notice of Motion that Alleged Contemnor Gerald J. Young moves for an Order Dismissing the Order to Show Cause re Contempt issued by the Court on April 29, 1983 as it applies to Gerald Young. (Sent to Brieant Chambers)

August 1, 1984—Filed Notice of Motion by Gerald J. Young for a Judgment of Acquittal as to the charges of Criminal Contempt. (Sent to Brieant Chambers)

August 3, 1984—Filed Defendant Barry Klayminc's Memorandum of Law in support of motion to set aside the Jury Verdict and to dismiss the Order to Show Cause and/or hold a due process hearing. (Sent to Brieant Chambers)

August 17, 1984—Filed Notice of Motion by Contemnor George Cariste for an Order of Acquittal (Sent to Judge Brieant's Chambers)

Sept. 11, 1984—Filed Memo Endorsed on Order to Show Cause dated from 5-4-84 . . . Defendant Pariseault appears (Attorney John A. O'Neill Jr. present) Defendant withdraws his plea of not guilty and enters a plea of guilty and is sentenced. Brieant, J.

September 11, 1984—*USA v. Robert J. Pariseault*: Filed Judgment: Imposition of sentence is suspended and defendant is placed on probation for a period of six (6) months, subject to the standing probation order of this Court. So ordered Brieant J. dated 9-11-84.

September 12, 1984—Filed Affidavit of Leonard J. Comden and Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment.

October 5, 1984—Filed Request to Take Judicial Notice submitted by J. Joseph Bainton.

October 5, 1984—Filed Memo of Law of the Government in Opposition to Various Post-Trial Motions of the Defendants.

October 29, 1984—Filed Letter to Judge Brieant from Sol Klayminc expressing his lack of funds, inability to represent himself, and request for a public defender. (Sent to Brieant's chambers)

November 30, 1984—Filed Memorandum of the Government in Opposition to Defendant Barry Klayminc's Post-Trial Motions.

January 23, 1985—Filed Notice of Motion by Sol Klayminc of an Order of Acquittal . . . and for an Order to Dismiss the Order to Show Cause dated from 8-3-84.

January 23, 1985—Filed Memorandum of the Government in Opposition to Defendant Barry Klayminc's Post Trial Motions.

January 24, 1985—Filed Memorandum and Order: . . . These criminal cases arise out of the sales of counterfeit Louis Vuitton products and the campaign waged by Vuitton to protect its trademark and profits . . . This court conducted a nine day trial which concluded on May 24, 1984. The trial

jury returned verdicts of guilty against defendants Sol Klayminc, Barry Klayminc, Gerald Young, George Cariste and Nathan Helfand. All defendants now move the Court to set aside the verdicts . . . All the defendants' motions are denied. The parties shall appear on March 1, 1985 for imposition of sentence . . . So ordered Brieant, J. dated 1-24-85.

Feb. 27, 1985—Defendant Sol Klayminc appears (Atty. William Weininger present) is sentenced. FIVE YEARS, advised of right to appeal, ROR pending appeal.

Feb. 27, 1985—Defendant Barry Klayminc appears (Atty. James Cohen present) is sentenced to NINE YEARS, (sic) (should be months) advised of right to appeal, ROR pend appeal.

Feb. 27, 1985—Defendant Young appears (Atty. Leonard Comden present) and is sentenced to TWO and ONE-HALF YEARS, advised of right to appeal, ROR.

Feb. 27, 1985—Defendant Cariste appears (Atty. Mitchell Craner present) and is sentenced to NINE MONTHS advised of right to appeal and is ROR.

March 27, 1985—*USA, ex rel VUITTON ET FILE & LOUIS VUITTON, S.A. VS GERALD J. YOUNG & GEORGE CARISTE*: Filed NOTICE TO THE DOCKET CLERK THAT RECORD ON APPEAL HAS BEEN CERTIFIED & TRANSMITTED TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT on 3-27-85.

March 28, 1985—*U.S.A. ex rel VUITTON ET FILS, S.A. and LOUIS VUITTON, S.A. VS SOL N. KLAYMINC*: Filed FIRST SUPPL. RECORD from Notice to Docket Clerk, that record on appeal has been certified and transmitted to the US COURT OF APPEALS for the Second Circuit on 3-28-85.

April 1, 1985—*U.S.A., ex rel VUITTON ET FILS, S.A. & LOUIS VUITTON, SA VS BARRY KLAYMINC*: Filed 2nd SUPPL. RECORD from Notice to the Docket Clerk, that the record on appeal has been certified and transmitted to the U.S. Court of Appeals for the Second Circuit on 4-1-85.

THE WALL STREET JOURNAL

Monday, June 28, 1982

Section 2

MAKERS OF DESIGNER GOODS STARTING TO CRACK DOWN ON COUNTERFEITING

By DENNIS KNEALE

Staff Reporter of THE WALL STREET JOURNAL

NEW YORK—Designer jeans were what Leo Sterling sold. The labels said Gucci, Jordache, Calvin Klein and so on. The garments were counterfeit—cheap jeans emblazoned with fake labels—but it became a \$2.5 million business that brought the silver-haired Mr. Sterling a Rolls-Royce Silver Cloud and a \$150,000 salary.

It also brought him a federal court conviction and a seven-year prison sentence.

"People used to laugh at these cases," says Joseph Bainton, trademark attorney for Vuitton & Fils S.A. "Nobody's going to die from a counterfeit purse." A lawyer for Jordache Enterprises Inc. says, "A lot of people don't mind that they're wearing counterfeit goods. It's very frustrating."

The manufacturers mind. They are lobbying Congress for stiff federal penalties; a bill is scheduled for committee hearings next month. The manufacturers are beginning their own policing operations to catch fakers. And the courts are starting to pay attention; counterfeitors are winding up in jail or with severe fines.

White-Collar Crime

Trade "knockoffs," or counterfeiting, grew in the 1970s along with the craze for status-laden labels on apparel, shoes, luggage and jewelry. Today counterfeiting extends to toiletries, aircraft parts, motor oil, golf clubs and scores of other products, at an estimated cost to manufacturers of billions of dollars yearly.

But, oddly, label counterfeiting itself doesn't carry serious criminal penalties. Most states consider it a

misdemeanor. Indeed, Mr. Sterling and eight associates at Designer Sportswear Inc., his firm, were convicted on charges of wire fraud, because they used the telephone in conducting their business.

The court papers outline a sophisticated operation that cheated more than 500 small retailers around the country. Bank officials were bribed to issue worthless checks, and merchants were paid off to provide credit references. Mr. Sterling's sales manager got a five-year prison sentence and his top salesman got three years.

Apparel makers are the manufacturers moving most aggressively against counterfeiters. Jordache, which has seized \$10 million worth of imitation jeans this year, placed a half-page ad in the Los Angeles Times recently about the Sterling conviction.

"It's to get the word out to the counterfeiter; if you've got even one pair of counterfeit Jordache jeans, you can expect to see me," says Martin Rube, the firm's Los Angeles attorney.

The manufacturers have begun undercover operations that sometimes have a Pink Panther flavor. A Jordache detective recently found—and bought—a pair of fake Jordache jeans at a small shop in the San Fernando Valley, U.S. marshals returned with a court-obtained seizure order—and found just one more pair of fake jeans.

Jordache threatened to sue anyway, and the shopowner provided the name of his supplier, Mr. Rube says.

The issuance of seizure orders by federal judges, a new development, began after an attorney simply asked a judge for one. The manufacturers also have persuaded federal judges to take an unusual step—appointing company attorneys as special prosecutors when counterfeiters continue operating after being ordered to stop.

Mr. Bainton of Vuitton, for instance, recently was appointed federal prosecutor here to try Sol N. Klayminc, who faced contempt charges in a luggage-counterfeiting operation.

The defendant, whom Mr. Bainton calls a "typical upper-middle-class garment type," was convicted and awaits sentencing. He could get up to six months in jail. Mr. Bainton is being asked for a sentencing recommendation, and he is urging jail time.

"Even if he doesn't get thrown in the hoosegow," the attorney says gleefully, "he was fingerprinted and photographed right next to the muggers and the mother-rapers. I'm sure that was an experience he'll remember."

Trademark attorneys aren't in agreement on whether fines or jail terms offer the most effective deterrent to counterfeiting. Most attorneys favor both. Some recent cases have provided satisfaction for all:

- A knockoff artist selling counterfeit rock-group T-shirts began serving a 60-day jail sentence on June 1 on conviction of contempt, after two years of appeals that were exhausted when the U.S. Supreme Court declined to hear his case.
- In Miami, a judge imposed a \$350,000 judgment against a counterfeiter of Playboy blouses.
- A federal judge in Chicago handed down the largest judgment ever in a trademark-counterfeit case, ordering a husband-and-wife T-shirt team to pay \$965,355 for counterfeiting more than 200,000 shirts and jerseys with rock-group designs.

"This was a record breaker," says Michael Roche, attorney for Winterland Concessions Co., which had exclusive rights to the rock-group labels. "We asked the judge to send out a message to this multimillion-dollar subculture—and that's what he did."

In Hot Pursuit

Getting salesmen for smaller retailers to name suppliers is a prime goal of companies. "If you're just constantly knocking off stores, all you're doing is clipping fingernails. We're after the wrist, elbow, up to the shoulder—the manufacturer," says Merritt Kanner. His

Kanner Security Group in Miami uses 10 undercover detectives, dummy corporations and false storefronts to lure counterfeiters. "We're conning the con men," he says.

It gets expensive. Calvin Klein spent \$1.5 million in 1981 (when profits were about \$11 million) combating counterfeiting, which costs the designer about \$20 million a year, its lawyer says. Jordache spends as much as \$500,000 annually for six full-time detectives and two attorneys.

Attorneys concede that most fines fail to cover companies' enforcement expenses. "Attorneys' fees in most cases outweigh the fine recovery," says Stanley Yavner, trademark counsel for Calvin Klein and other labels.

Designer firms are hoping the congressional bill, which would impose maximum five-year prison terms, personal fines of \$250,000 and corporate fines of \$1 million, will reverse that trend.

"I think what will happen is we're going to see more jail sentences and more counterfeiting fines," says James Bikoff, president of the International Anticounterfeiting Coalition, the business group that pushed the proposal. "The word will spread through the counterfeit trade that this is getting dangerous, fellas."

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SOL KLAYMINC, PLAINTIFF

—*against*—

J. JOSEPH BAINTON and REBOUL MACMURRAY,
HEWITT, MAYNARD & KRISTOL,
a partnership, DEFENDANTS

COMPLAINT

Plaintiff, by his attorney, BRIAN FISHKIN, complaining of the defendants, alleges as follows:

AS AND FOR A FIRST CAUSE OF ACTION

FIRST: At all times hereinafter mentioned, the plaintiff, SOL KLAYMINC, was a resident of the State of New York, County of New York.

SECOND: Upon information and belief, at all times hereinafter mentioned, the defendant J. JOSEPH BAINTON was an attorney duly admitted to practice in the courts of the State of New York and a partner in the firm of REBOUL, MacMURRAY, HEWITT, MAYNARD & KRISTOL, with offices at 45 Rockefeller Plaza, New York, New York.

THIRD: At all times hereinafter mentioned, the plaintiff was the President and Chief Executive Officer of Karen Bags, Inc., a wholly owned corporation in the business of manufacturing ladies handbags and belts, which items are sold throughout the United States.

FOURTH: On or about the 28th day of June, 1982, at New York, New York, the defendant J. JOSEPH

BAINTON, in the presence and hearing of one Dennis Kneale and several others, maliciously spoke of and concerning the plaintiff in the following words:

"... [H]e was fingerprinted and photographed right next to the muggers and mother-rapers. I'm sure that was an experience he'll remember.

FIFTH: The words spoken about the plaintiff by the defendant J. JOSEPH BAINTON were false and defamatory.

SIXTH: The said words were spoken of and concerning the plaintiff with the intent and for the purpose of injuring the plaintiff in his reputation and business and were known at all times by the defendant J. JOSEPH BAINTON to be false.

SEVENTH: By reason of the statements, the plaintiff has been injured in his good name, character and reputation, and in his feelings, mind and body, and has been held up to ridicule and contempt by his friends, acquaintances, business associates and the public, all to his damage in the sum of \$2,000,000.00.

AS FOR THE SECOND CAUSE OF ACTION

EIGHTH: The plaintiff repeats and reiterates each and every allegation contained in paragraphs numbered "FIRST" through "SIXTH", inclusive, of this complaint as though fully set forth at length herein.

NINTH: By reason of the foregoing defamatory statement of and concerning the plaintiff, various firms, persons and corporations with whom the plaintiff had previously been doing business, including the J. C. Penney Co., Inc., thereafter refused to do business with the plaintiff, to his damage in the sum of \$250,000.00.

WHEREFORE, plaintiff demands judgment as follows: two million dollars (\$2,000,000.00) on the first cause of action; two hundred fifty thousand dollars

(\$250,000.00) on the second cause of action; together with attorney's fees, interest, costs and disbursements of this action.

BRIAN FISHKIN
Attorney for Plaintiff
116 John Street
New York, New York 10038

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NY

GOVERNMENT EXHIBIT 169

Pg. 1

3/27/83

Note To Mel West:

In Meeting With Saul Klayman The Following Is Proposed: Re: *Plant In Haiti*

1. Merchandise To Be Manufactured In Haiti. Ladies Handbags, The Leather And By Products For The Same Have To Be Purchased For Cash. Approximately 50% Cash Will Be Necessary, In Advance, To Pay For The Ingredients Leather, Fabric And By Products. This Amount Advanced Will Cover Payroll, Shipping, Cutting, And Start Up Expenses. Once The Plant Starts Operating, An Advance Of Only 25% Will Be Necessary To Continue The Operation. This Is Predicated On The Leather Bags Submitted.
2. In The Future When Other Items Are Starting To Be Produced In Haiti, The Fabric For Same Will Have To Be Paid For Up Front. On These Items A Savings Will Be Effectuated Of Approximately 25%.
3. At The Present Time We Are Operating Under A Franchise Owned By A Black Englishman Whose Firm Is Known As S.M.E., S.A., Whose Name Is Harry Daniels. This Individual Has A 25% Interest In My Business, Of Which I Own 50%. The Other 25% Is Owned By A Close Personal Friend Of Mine Who Is President Of United Thread Mills, Located In Rockville Center, L.I., N.Y., Whose Name Is Dave Henkus, Who Resides In Rockville Center, L.I., N.Y. The Approximate Total Cash And Machinery Invest-

ment, At This Time, Is Approximately \$100,000. We Have Pre-Paid Our Rent Through Dec. 1983.

/s/ Sol Klaymine

Pg. 2
Cont.

4. The Building The Plant Is Housed In Is A Butler Constructed Bldg. Comprising 21,000 Square Feet Including The Offices. My Firm Occupies Approximately 40% Of The Area.
5. The Owner Has Made It Known To Me That He Would Like To Vacate The Area He Is Utilizing, Which Is Used For Manufacturing Of Jeans, Etc., And Sell The Bldg., Which Is Approximately 21,000 Sq. Ft. At A Price Of \$10.00 A Foot.
6. The Deal Is Predicated On The Purchase Of The Equipment, Outside Of The Machinery, Such As Air Conditioners, Office Equipment, Electrical Fixtures, Etc. . . . , For A Negotiable Price Of \$30,000.00.
7. With The Present Setup In The Plant, I Can Produce Approximately 3500 Units A Week, Once The Production Has Started. With An Addition of Approximately \$25,000 Investment For Machinery And Equipment, We Will Be Capable Of Doubling Our Production.
8. In Addition, To Apply For Our Own Charter—"Franchise"—To Use The Name "*Crystal, S.A.*", A Fee Of \$5000.00 Will Have To Be Advanced And Is Held In Escrow By The Authorities, Until Franchise Is Granted, At Which Time Money Held In Escrow Is Refunded,
9. The Other Two Investors Are Strictly Silent Partners,

These Papers Are Being Signed By Me With Full
Knowledge Of What Is Contained.

/s/ Sol Klayminc 3/27/83

To Purchase	Cost Sheet	
	LV	
1000 Pcs.	1. Satchel	\$25.00
750 Pcs.	2. Clutch W/Top Zipper	\$25.00 \$11.00
750 Pcs.	3. Shopping Bag	\$28.00

Note: All Leather Bindings And Trimmings.

Gucci			
750 Pcs.	500 Brown 250 Blue	1. Satchel W/Double Strap	\$30.00
750 Pcs.	500 Brown 250 Blue	2. Doctors Case	\$30.00
500 Pcs.	300 Brown 200 Blue	3. Large Camera Case	\$30.00
500 Pcs.	300 Brown 200 Blue	4. Small Camera Case	\$20.00

Note: All Trimmings To Be Genuine Leather.
Two Colors: Brown And Navy.

Note: On Gucci—Two Weeks Delivery On Requested Quantity

On Both of These Items, 25% To Be Pd-Up Front W/Sol Klayman, Of Total Order, And Balance To Be Given To Sol To Pay For Merchandise Upon Completion And His Satisfactory Examination Of Merchandise. All Merchandise Guaranteed. Defective Merchandise To Be Returned At Owners Expense.

3/27/83

Cost Sheet Of
Merchandise To Be Produced In Haiti

500 Units	#902 Leather Hobo	\$16.00
500 Units	#7855 Pouch Leather	\$16.00
500 Units	#7860 Leather Body Bag (Without Bow)	\$16.00
500 Units	#7843 Leather Covered Frame Bag (Without Welting)	\$16.00

Note: Wants 500 Units Of A Style To Start Up With
We Select Colors.

***Note: On Gucci Attache Case—For An Order Of 100 Pcs.—
Approximately \$95.00 A Unit With Delivery Of Said
Quantity Approximately 30 Days

Garment Bag To Be Made In Haiti

*****Note: Delivery Of LV's In New York Or New Jersey
Delivery Of Gucci In Miami

As Per Sol Klayman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

78 Civ. 5863 (CLB)

UNITED STATES OF AMERICA, *ex rel.*,
VUITTON ET FILS S.A., and
LOUIS VUITTON, S.A., PLAINTIFFS

—against—

KAREN BAGS, INC., JADE HANDBAG CO., INC., SOL N.
KLAYMINC and JAK HANDBAG INC., DEFENDANTS AND
ALLEGED CRIMINAL CONTEMNORS

—and—

SYLVIA KLAYMINC, BARRY KLAMINC, JERRY ROTH, GEORGE
CARISTE, DAVID HENKUS, HENRY DANIELS, S.M.E.,
S.A., CRYSTAL, S.A., "JOHN DOES" Nos. 1 THROUGH
10, and "JANE DOES" Nos. 1 THROUGH 10, ADDITIONAL
ALLEGED CRIMINAL CONTEMNORS

AFFIDAVIT

STATE OF NEW YORK)
)
) SS.:
COUNTY OF NEW YORK)

J. JOSEPH BAINTON, being duly sworn, deposes and
says:

1. I am a member of the bar of this Court and a member of the firm of Reboul, MacMurray, Hewitt, Maynard & Kristol, attorneys for plaintiffs Vuitton et Fils S.A., and Louis Vuitton S.A. (hereinafter collectively referred to as "Vuitton"). Since 1978 I have been the attorney in charge of efforts in the United States to enforce Vuitton's rights in respect of its federally regis-

tered trademark No. 297,594. In that capacity, I have on prior occasions been specially appointed by this and other Courts to represent the United States of America in respect of the prosecution of alleged contempts of court orders prohibiting persons sued by Vuitton from infringing its registered trademark. My colleague, Robert P. Devlin, Esq., has likewise been involved for years with Vuitton's trademark enforcement campaign and has also previously been specially appointed by this Court to prosecute criminal contempt cases.

2. I make this affidavit in support of Vuitton's application for similar appointments and for the Court's permission for Mr. Devlin and me to cause to be conducted certain investigatory activities described below designed to prove beyond a reasonable doubt that alleged contemnor Sol Klaymire ("Sol"), his son, alleged contemnor Barry Klaymire ("Barry"), his wife, alleged contemnor Sylvia Klaymire ("Sylvia"), his companies, alleged contemnors Karen Bags, Inc. ("Karen"), Jade Handbag Co., Inc. ("Jade"), Jak Handbag Inc. ("Jak"), S.M.E., S.A. ("SME") and Crystal, S.A. ("Crystal"), his partners and co-conspirators, alleged contemnors Henry Daniels, Dave Henkus, George Cariste ("Cariste"), Jerry Roth ("Roth"), "John Does" Nos. 1 through 10, and "Jane Does" Nos. 1 through 10, whose identity is presently unknown, are engaged in an international conspiracy to violate orders of this and other federal district courts.

BACKGROUND OF THIS ACTION

3. On December 12, 1979, this Court entered a preliminary injunction restraining defendants from infringing Vuitton's registered trademark. It is undisputed that Sol and his family have at all relevant times been engaged in the manufacture and sale on a wholesale basis of ladies' handbags and accessories.

4. On July 8, 1981, this Court issued an order directing Karen, Jade, Sol, David Kasman, Leon Cohen, Sylvia

and Thelma "Doe" to show cause why they should not be cited for criminal contempt of the aforesaid preliminary injunction.

5. This Court ultimately referred the matter for trial as a misdemeanor before Magistrate Bernikow. That trial was delayed while Vuitton filed with the United States Court of Appeals for the Second Circuit a petition for writ of mandamus directing that the case be tried before the District Court as an offense other than a misdemeanor. That petition was denied.

6. Thereafter a trial was held before Magistrate Bernikow and Sol, Karen and Jade were convicted of criminal contempt.

7. Before sentencing, an agreement was reached to dispose of the defendants' civil liability both for civil contempt and the claims asserted in the complaint.¹ A written agreement was reached on July 13, 1982, which, in substance, provides for joint and civil liability among Sol, Sylvia, Barry, Jak, Karen and Jade to Vuitton for the sum of \$100,000 payable over 36 months, together with interest thereon at the rate of 16% per annum. Such payments were to be in equal monthly installments of \$3,540.44.

8. Payments for six months aggregating \$21,242.64 were made, and notwithstanding duly served notices of default by Vuitton pursuant to the aforesaid agreement no further payments have been made. Because of the developments discussed below no action has been taken by Vuitton in respect of these defaults.

9. Prior to sentencing, the civil settlement was disclosed *in camera* to Magistrate Bernikow, who in turn neither imposed fines on Jade, Karen or Sol nor a custodial sentence on Sol. Rather, the Court merely placed all of them on probation. A copy of the transcript of the sentencing hearing is annexed hereto as Exhibit A.

¹ Prosecution of the action had been informally stayed pending the decision of the Ninth Circuit in *Vuitton et Fils S.A. v. J. Young Enterprises, et al.*, 644 F.2d 769 (9th Cir. 1981).

10. The civil action was finally disposed of by the entry of a permanent injunction on July 30, 1982. A copy of that permanent injunction is annexed hereto as Exhibit B.

11. In December 1982, Sol commenced an action in the Supreme Court of the State of New York, County of New York, against me and my law firm seeking the recovery of \$2,250,000. A copy of the complaint is annexed hereto as Exhibit C.

THE FLORIDA "STING" OPERATION

12. During the early part of this year, Vuitton, Gucci Shops, Inc. ("Gucci"), Calvin Klein Jeans, and certain other owners of prestigious trademarks were contacted by Kanner Security Group, Inc. ("Kanner"), a Florida private investigatory firm. The principals of Kanner are all former FBI agents.

13. It was proposed to Vuitton and others that they share in the expense of operating a "sting" operation. In substance the sting involved operatives of Kanner posing as persons interested in trading in counterfeit trademarked wares on a large scale. That operation has provided and continues to provide information useful to all of the trademark owners participating in it. I shall limit this affidavit solely to the facts developed by this operation which bear on the present application.

14. Mr. Gunnar Askland ("Askland"), a former FBI agent, who I am informed worked on a large FBI investigation commonly known as "Abscam", has, on behalf of Kanner, been primarily responsible for the operation of this sting. He in turn engaged the services of Mr. Mel Weinberg ("Weinberg"), who, as the Court may recall, posed as the "financial adviser" to the "fake Sheik" in the Abscam operation.

15. In connection with this sting, Weinberg has used the fictitious name "Mel West" and Askland has used the fictitious name "Chris Anderson".

16. I am informed that during the course of their operation of this sting they made friends with a Nate Helfand ("Helfand"). Helfand is not aware of the true identities of Weinberg and Askland and perceives them to be persons either directly or tangentially affiliated with organized crime.

17. Through Helfand, who had been paid for his services and promised bigger things in the future, Weinberg and Askland have been able to make purchases of counterfeit articles, including counterfeit Vuitton articles from mid-level distributors and relatively small-time manufacturers.

18. Several weeks ago, Helfand brought to the attention of Askland and Weinberg an individual by the name of "Sol", who told Helfand that he (a) "had been burned by Louis Vuitton to the tune of \$100,000 in New York City", (b) was still in the business of selling counterfeit Vuitton wares and (c) was opening a large factory in Haiti. Sol is the only defendant in a Vuitton action who has never agreed or been ordered to pay the sum of \$100,000.

19. Helfand developed his relationship with Sol and discussed it with Askland and Weinberg. Askland and Weinberg told Helfand that if Sol had a proposal which they found interesting they had money to invest in it.

20. These conversations resulted in a dinner meeting in Florida on March 27, 1983, attended by Sol, Sylvia and Helfand. A copy of both sides of the American Express slip which Helfand used to pay for the dinner is annexed hereto as Exhibit D.

21. Helfand reported to Askland that the substance of the dinner discussion related to the sale by Sol of counterfeit Vuitton and Gucci wares and the possible investment by Helfand's "contacts" (Askland and Weinberg) in the Haiti factory.

22. Annexed hereto as Exhibit E is a memorandum hand written by Helfand and signed by Sol, which describes in some detail the present and proposed nature

of the operation of the Haitian factory. Also annexed as part of Exhibit E, are recent and one not so recent exemplar of Sol's signature. Comparison of these signatures on the Helfand-obtained document is genuine.

23. Helfand stated to Weinberg that during this dinner meeing, Sol said that "Haiti was a wonderful country. Unlike New York, where I have been busted by Vuitton twice, in Haiti once you establish good relations with the Government you can do anything you want."

24. At this meeting Sol delivered to Helfand, who in turn delivered to Askland, several counterfeit Vuitton articles. One of those articles was hand delivered to me on March 29, 1983, by L. Merritt Kanner, president of Kanner.

25. I have examined the article and represent to the Court that it is a counterfeit. I wish to remind the Court that on several occasions during trials in this Court I have been qualified as an "expert" competent to express such an opinion.

26. Sol also gave Helfand certain costing information which Helfand reduced to writing. A copy of Helfand's costing notes is annexed hereto as Exhibit F.

27. Sol told Helfand, who in turn told Askland, that certain Vuitton products could be picked up from a man named "George" in New Jersey. Based upon other litigation in the United States District Court for the Eastern District of Pennsylvania and based upon a telephone number provided by Sol to Helfand, and in turn provided by Helfand to Askland, we know George to be "George Cariste", who has been identified during pre-trial proceedings in other cases as a large supplier of counterfeit Vuitton merchandise throughout Pennsylvania and the Atlantic City area. He reportedly moves his factory every two weeks to avoid detection by Vuitton. Sol proposed that Helfand pay him for the counterfeit Vuitton merchandise and pick up the merchandise from Cariste.

28. Sol also proposed that counterfeit Gucci articles could be purchased from him, and picked up from one

Jerry Roth ("Roth") in South Florida. Roth is a party to the permanent injunction and final judgment in the case of *Vuitton et Fils S.A. v. J. Young Enterprises, Inc., et al.*, which, as this Court will recall, was twice litigated before the United States Court of Appeals for the Ninth Circuit. The final judgment entered by the United States District Court for the Central District of California provides for the recovery of \$750,000 by Vuitton jointly and severally from any defendant thereto in the event that, subsequent to entry of that judgment, Vuitton can prove any violation of that order by any party to it. Through other investigators we have recently purchased counterfeit Vuitton merchandise from Roth.

29. Helfand informed Askland that Sol had advised him that everyone who was working with him, including Roth and Cariste, were well aware of the permanent injunctions entered by this Court and other Courts expressly prohibiting the conduct in which they are presently engaged. In addition, all of the alleged contemnors know that the person with whom they are acting in concert and participation, Sol, has already once been convicted by this Court for criminal contempt of an order prohibiting the infringement of Vuitton's trademark.

30. Finally, Sol told Helfand, who in turn told Askland, that Barry has a 25% interest in his company. Other "silent partners" are alleged contemnors David Henkus ("Henkus") and Henry Daniels ("Daniels"). Henkus resides on Long Island. Daniels appears to reside in Haiti and his citizenship is presently unknown.

SPECIAL APPOINTMENT OF COUNSEL TO PROSECUTE APPARENT CRIMINAL CONTEMPT

31. For all of the foregoing reasons, it appears that probable cause exists to suspect that each of the above named alleged contemnors, and others whose identity is presently unknown, are engaged in a course of conduct criminally contumacious of this Court's final judgment

and permanent injunction entered July 30, 1982. Accordingly, upon the authority of *Musidor B.V. v. Great American Screen*, 658 F.2d 60, 64-65 (2d Cir. 1981), and also in light of the several similar prior appointments, Vuitton respectfully requests that the Court specially appoint J. Joseph Bainton, Esq., and Robert P. Devlin, Esq., members of the bar of this Court and attorneys with the firm of Reboul, MacMurray, Hewitt, Maynard & Kristol, to continue the investigation and, in due course, the prosecution of what appears to be a massive international conspiracy to violate this Court's permanent injunction.

PROPOSED INVESTIGATIVE PROCEDURES

32. As this Court has recognized previously, an attorney specially appointed to represent the United States in the context of a criminal contempt proceeding in a practical sense stands in somewhat different shoes than an Assistant United States Attorney. Perhaps out of an over-abundance of caution and in order to do all that is possible to avoid criticism later, I wish to advise the Court of certain steps that, with the Court's permission, if specially-appointed to represent the United States, we propose to take.

33. On the assumption that this application would be granted, preliminary arrangements have been made for a meeting among Sol, Barry, Askland and Weinberg at the Plaza Hotel in New York City, at noon on Tuesday, April 5, 1983. Arrangements have been made to rent a two bedroom suite. In a technical fashion similar to that employed in the Abscam operation, the meeting among those individuals will be videotaped so that at some later time there can be no question as to what was said to whom and by whom. We expect that Sol will repeat the highly incriminatory statements he made last week at dinner with Helfand and on other occasions over the telephone to Helfand when Weinberg and/or Askland were listening on different extensions of the telephone on which

Helfand was speaking. Sol has also been requested to bring to the meeting 25 of his better quality counterfeit Vuitton satchel purses, which he has been told Askland and Weinberg plan to give as gifts to female attendees at a party they are giving.

34. In this regard, I bring to the Court's attention A.B.A. Formal Opinion 337, dated August 10, 1974, which in a civil context states that it is unethical for an attorney to participate in the surreptitious recording of a conversation. There is no similar prohibition against a prosecutor knowingly condoning or arranging for such an event. *Lopez v. U.S.*, 373 U.S. 429 (1963); *U.S. v. White*, 401 U.S. 745 (1971).

35. For obvious reasons Vuitton requests that this affidavit and any order granting this application be filed and kept under seal pending further order of this Court.

Conclusion

36. For the foregoing reasons and in the interest of justice, Vuitton's applications should be granted in all respects.

/s/ J. Joseph Bainton
J. JOSEPH BAINTON

[Affidavit Omitted in Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

**ORDER APPOINTING COUNSEL AND APPROVING
CERTAIN INVESTIGATORY MEASURES**

Upon the affidavit of J. Joseph Bainton, Esq., sworn to March 30, 1983, and upon all other prior proceedings heretofore had herein;

The Court finds that probable cause exists to believe that the above-named alleged criminal contemnors are knowingly engaged in a course of conduct criminally contumacious of this Court's final consent judgment and permanent injunction filed July 30, 1982, and accordingly it is hereby

ORDERED that J. Joseph Bainton, Esq., and Robert P. Devlin, Esq., members of the bar of this Court, are hereby specially appointed to represent the United States of America in connection with the further investigation of the alleged aforesaid criminally contumacious course of conduct and the ultimate prosecution therefor; and it is further

ORDERED that Messrs. Bainton and Devlin, in their capacity as specially appointed attorneys for the United States of America, may properly cause the investigation described in Mr. Bainton's March 30, 1983 affidavit to be conducted; and it is further

ORDERED that this order and Mr. Bainton's March 30 affidavit be filed and kept under seal pending further order of this Court.

Dated: New York, New York
March 31, 1983

/s/ [Illegible]
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

TRANSCRIPT OF TELEPHONE CALL

Tape 1(C)

4/1/83

* * * *

[7] MR. MEL WEINBERG: Right. Was that stuff that you want to keep?

MR. SOL KLAYMINC: Well, I—I could definitely make a profit from it.

MR. MEL WEINBERG: All right, so then we'll pay him off.

MR. SOL KLAYMINC: Well, I wouldn't rush into it, you know, but if—

MR. MEL WEINBERG: All right, well, you'll call the shots, all right?

MR. SOL KLAYMINC. Yeah. Yeah.

MR. MEL WEINBERG: Now, is there any way—because your—when are you going—did you file bankruptcy yet or you're just filing—?

MR. SOL KLAYMINC: No. My lawyer who's doing all this told me, "Don't rush. Let me advise you what to do." Now, I plan to call him when I get through with you and Nate today.

[8] MR. MEL WEINBERG: Well, what do you want to call him for?

MR. SOL KLAYMINC: I want to know what we should do. I'll bring him up to date on everything that's happening.

MR. MEL WEINBERG: Well, I wouldn't tell him too much. Let's get all this—

MR. SOL KLAYMINC: No, I won't tell him anything. No, I'll just tell him what's happening like the factory, a guy put a restraining order on it, and the factor lifted it, you know—I'll let him know this stuff and what he'd advise me to do, what—

MR. MEL WEINBERG: Oh. All right. The other thing, now, on the stuff you shipped out, right?

MR. SOL KLAYMINC: Yeah.

[9] MR. MEL WEINBERG: Okay, if you file Chapter XI, can they pick up on that?

MR. SOL KLAYMINC: No.

MR. MEL WEINBERG: You covered it?

MR. SOL KLAYMINC: Yes. I got it covered.

MR. MEL WEINBERG: You sure, now.

MR. SOL KLAYMINC: Yeah.

MR. MEL WEINBERG: All right. Two, you said that you formed another company.

MR. SOL KLAYMINC: Right, in Florida.

MR. MEL WEINBERG: Oh. the company's in Florida?

[10] MR. SOL KLAYMINC: Right.

MR. MEL WEINBERG: Oh, it's a Florida corporation?

MR. SOL KLAYMINC: Right. I'm using the same name—in other words, before it was Karen Bags, Incorporated.

MR. MEL WEINBERG: Right.

MR. SOL KLAYMINC: Now it's called Karen International Incorporated.

MR. MEL WEINBERG. And that's a separate corporation.

MR. SOL KLAYMINC: Right, completely different. I didn't put the officers in yet.

MR. MEL WEINBERG: All right. Now, you ship stuff down to them?

MR. SOL KLAYMINC: I'm going to ship stuff to here. I'm going to—maybe I'll ship it to Nate from there.

No, my plan would be in the future to ship a finished product [11] into Florida, you know, 'cause they'll be very close, from Haiti to Miami.

MR. MEL WEINBERG: Right.

MR. SOL KLAYMINC: —And Nate is not far away from there, and we can work out some transportation, you know. So from there we will distribute it wherever we have to.

MR. MEL WEINBERG: Well, we're renting⁵ more space by Nate for him.

MR. SOL KLAYMINC: Oh, good.

MR. MEL WEINBERG: So you'll have it. Now, the only thing I'm worried about is there's no way of them tracing that other corporation, you know.

MR. SOL KLAYMINC: No, no, no. I have no officers down as yet. I'm deciding, you know, who, which one of my friends I can put in because it'll be a temporary thing until we finish up with the other company.

[12] MR. MEL WEINBERG: All right, how much stuff are you going to ship down to 'em?

MR. SOL KLAYMINC: Well, at the present time it's being held up. You see, I—I sold to Loehmann's (I don't know if you know who Loehmann's is).

MR. MEL WEINBERG: Yeah, I heard of 'em.

MR. SOL KLAYMINC: Yeah, they're the largest discount place, I would say, in the country.

MR. MEL WEINBERG: Right.

MR. SOL KLAYMINC: One of the largest. And we did a very big job; in fact, we were their main producer—the biggest supplier of handbags to them. And at the time, we were—it looked bad. I said, "Look, Lydia" (that's the buyer's name)—I gave 'em a shot from the regular Karen company and I said, "Now (this is for my, another company. I want you to keep it [13] separate." Okay? Now, she bought from me alone about to the tune of about twenty-five to twenty-seven thousand dollars.

MR. MEL WEINBERG: Right.

MR. SOL KLAYMINC: Now, I shipped her the first shot, which was like nine thousand, and then some son of a bitch who was giving me problems there put a restraining order on Loehmann's. Evidently they found out that—well, that's—actually they're stopping the Karen Bags, Incorporated; they're not stopping the other one.

MR. MEL WEINBERG: Right.

MR. SOL KLAYMINC: But she got cold feet and she said, "Sol, I'm not going to take any more. I'm not going to ship out the stuff until this thing is straightened out." So I'm hoping that this C.I.T. is going to lift the restraining order, and then I could ship her the balance. The balance is coming, part of it is already in New York put away some place, and after that it's coming from Haiti, the balance.

[14] MR. MEL WEINBERG: Oh. But you got some stuff stashed away that you can use.

MR. SOL KLAYMINC: Right, exactly.

MR. MEL WEINBERG: I mean, is it stashed away safe that nobody knows?

MR. SOL KLAYMINC: Nobody'll know where it is.

MR. MEL WEINBERG: Because you know, apparently you must have a leak in your outfit if Loehmann's—you know, someone found out.

MR. SOL KLAYMINC: Well, they probaby were trying to find who some creditors were or somebody who was in with the receivables, and I guess they knew that we're working with Loehmann's and it could be, like you say, somebody from before. But right now there's only one name, my son, and this other guy that's connected with me right now who knows anything that's going on. Nobody else does.

[15] MR. MEL WEINBERG: All right, so what you're saying is you got enough stuff stashed away to give you—

MR. SOL KLAYMINC: —a start.

MR. MEL WEINBERG: —a start.

MR. SOL KLAYMINC: Right.

MR. MEL WEINBERG: What would you say, fifty thousand or so?

MR. SOL KLAYMINC: No, not quite. Twenty-five, thirty for sure.

MR. MEL WEINBERG: All right, that's enough

MR. SOL KLAYMINC: That's enough to give me a start.

MR. MEL WEINBERG: Right. All right, now, the other thing is with the—your lawsuit.

[16] MR. SOL KLAYMINC: Right.

MR. MEL WEINBERG: All right, where does that stand now?

MR. SOL KLAYMINC: Well, I have to call my lawyer, to be honest with you, and he says, "I'll advise you what to do." See, I mentioned Chapter XI and he says, "Chapter XI is out of it. It's got to be something else, but let me tell you," 'cause he's supposed to be a pretty big shot wher. it comes to bankruptcy. So I'll listen to him, I'll talk to him, and we'll go from there. Now, I—I got a plane ticket to go back Monday.

MR. MEL WEINBERG: Good.

MR. SOL KLAYMINC: Boy, they're charging a fortune of money.

MR. MEL WEINBERG: You're telling me. Well, we'll have cash up there for those pocketbooks.

[17] MR. SOL KLAYMINC: Oh, that's [LAUGHS]—that's nothing. That'll just about cover the plane fare. But this I have to give to the guy.

MR. MEL WEINBERG: Well, we'll get some money after the meeting. Are you listening?

MR. SOL KLAYMINC: Oh, okay, fine.

MR. MEL WEINBERG: You let me know how much you need and we'll rush it through for you.

MR. SOL KLAYMINC: Well, I'll tell you. Well, I'd like to get that charter finished with. In other words, once I leave you and I got the money for the charter, I'll get back to Haiti and I'll see that we get our check.

MR. MEL WEINBERG: Now, what do you mean by the—? You got to explain to me. You say "the charter"—what do you mean by "the charter"?

[18] MR. SOL KLAYMINC: Okay, it required five thousand dollars, a down—a deposit, when you declare a new company in Haiti and you want to get a charter or a franchise (let's call it a franchise).

MR. MEL WEINBERG: All right.

MR. SOL KLAYMINC: Now, when the—when the franchise is granted, then they give you back that money, but of course then you pay the legal fees so it costs you maybe twelve, fifteen hundred dollars. So they want to make sure that no fly-by-nights come in there, and also you got to have a place, a business, where you're operating from. Now, we have the place where we're operating from, and I didn't have the five thousand to give my attorney to go ahead with this.

MR. MEL WEINBERG: Okay, that's no—we'll take care of that for you.

[19] MR. SOL KLAYMINC: Okay, so if I could do that, then we can get the corporation going right away, our own, without this black man. I want to get this black man out of there.

MR. MEL WEINBERG: All right, we'll take care of the black man and you'll give us a look what machinery you want, and we'll take care—now, what about this other lawsuit you got with this firm? For what they [INAUDIBLE]?

MR. SOL KLAYMINC: L.V.?

MR. MEL WEINBERG: Yeah, L.—

MR. SOL KLAYMINC: Well, well they haven't bothered me lately. No, I settled with them for a hundred thousand dollars and I must have made payments of about eighteen, twenty, and they were going to do this and they were going to do that, and then I turned around and I sued them for two-and-a-quarter million, okay? Now, evidently since they got that they laid low; they

didn't press [20] nothing; I didn't make any payments to them and they didn't pursue anything.

MR. MEL WEINBERG: You must have scared the shit out of them.

MR. SOL KLAYMINC: That's right. I imagine they would be very happy to say, "Hey, you want to call it off?" You know It's not the L.V. I'm suing—I'm suing the attorneys for L.V.

MR. MEL WEINBERG: Oh, you sued the attorneys direct.

MR. SOL KLAYMINC: Right. They, you know, they had this article about me in the—and the fact that my business is closing—I'm blaming it on them also, so it—looks like my [INAUDIBLE]—

MR. MEL WEINBERG: Well, actually, it's not their fault, though, is it?

MR. SOL KLAYMINC: Yeah. Well, they didn't help me by putting that article there in the papers.

[21] MR. MEL WEINBERG: Well, yeah, but you were on the verge of going under anyway, right?

MR. SOL KLAYMINC: Well, it was—let's say it was slowing down and business was bad, the sales were not quite there, the financing was—you know, I was fighting for the financing to stay alive and all that, and I didn't give a shit anymore. At one point I wanted it to go down because I felt, "What am I going to save it for? So everything I make in the future I got to give to the factor." I was paying at one point to the factor like twenty-two, twenty-four percent interest, you know, and I owed them at one time a million dollars. So you know, you're talking about a couple—a hundred thousand dollars in interest each year. So there's—there's a profit right now, you know. If you had that, you would have no problem.

MR. MEL WEINBERG: How much do you think your bankruptcy would be for all together?

[22] MR. SOL KLAYMINC: Well, my liabilities will probably be about a million.

MR. MEL WEINBERG: A million?

MR. SOL KLAYMINC: Close, yeah.

MR. MEL WEINBERG: And how about your receivables?

MR. SOL KLAYMINC: Receivables and assets? They'll probably be able to squeeze out three hundred, maybe.

MR. MEL WEINBERG: you can't collect that, though, huh?

MR. SOL KLAYMINC: Not, not me. No.

MR. MEL WEINBERG: No.

MR. SOL KLAYMINC: No. They own all that.

[23] MR. MEL WEINBERG: Oh, they—oh, that's right, the factors get that.

MR. SOL KLAYMINC: Yeah, C.I.T., right. After them comes the other suppliers, which will get shit. They're going to look to go after me personally, of course, in the course of that and then I got this L.V. [INAUDIBLE]—

MR. MEL WEINBERG: Well—well, L.V. will go after you too?

MR. SOL KLAYMINC: Well, it depends what happens with this other suit, you know, if they're looking to make a deal. But I'm prepared to go personal, because it don't—it don't mean a thing to me.

MR. MEL WEINBERG: Yeah, what the hell can they do if you aint got nothing'?

MR. SOL KLAYMINC: Yeah, what are they going to do? I got this apartment. So I understand my lawyer here said that they got a Homestead Act here and they can't touch your apartment.

[24] MR. MEL WEINBERG: That's true. I don't think you can touch a guy's car or his home in Florida.

MR. SOL KLAYMINC: Right. That's right. In Florida, right.

MR. MEL WEINBERG: Right.

MR. SOL KLAYMINC: Oh, you heard that too.

MR. MEL WEINBERG: Yeah.

MR. SOL KLAYMINC: So that's the only thing, you know, they had one me. So I'll go personal. So what the hell are they going to take from me?

MR. MEL WEINBERG: Hey. Put it in your kid's name, I guess, huh?

MR. SOL KLAYMINC: Well, no, I'll just leave it as is, but like if they can't take it away I don't have to worry about whose name, you know, leave it under my wife and myself. I'm still not sure because with this L.V., I had my wife sign personally also.

[25] MR. MEL WEINBERG: Oh, they had her on the papers too?

MR. SOL KLAYMINC: Yeah, and also with C.I.T., so we don't know yet the—

MR. MEL WEINBERG: Well, what could C.I.T. do to you? They can't do—I wouldn't worry about them. I can take care of that problem.

MR. SOL KLAYMINC: Okay, if you can take care of them, then a big part—

MR. MEL WEINBERG: Yeah, but don't tell your lawyer or anyone.

MR. SOL KLAYMINC: I wouldn't tell a soul, but—

MR. MEL WEINBERG: But that, I don't think will be any problem. The only other problem would be Louis Vuitton.

[26] MR. SOL KLAYMINC: Right. Well, again, that—that libel suit that I'm countersuing them with might shut them up, too.

MR. MEL WEINBERG: Whose idea was that?

MR. SOL KLAYMINC: Well, it was mine, because as soon as the article came out, we saw the—that it was a lie; the article had a lie that they said I was finger-printed, I was mugged, and I was amongst the mother-muggers, mother-rapers—you know, they made me look like I was the lowest in the—and it was definitely a case for libel.

MR. MEL WEINBERG: What did they actually get you for?

MR. SOL KLAYMINC: Well, they walked in again and they caught me with the L.V. stuff.

MR. MEL WEINBERG: Oh, you're manufacturing 'em?

[27] MR. SOL KLAYMINC: Right. I was the "kingpin," they said.

MR. MEL WEINBERG: Were you?

MR. SOL KLAYMINC: Yeah, I was.

MR. MEL WEINBERG: Huh?

MR. SOL KLAYMINC: I was.

MR. MEL WEINBERG: You're that big, huh?

MR. SOL KLAYMINC: Yeah, I was pretty big then. They took away almost, I would say, selling price of about two-fifty, three hundred thou'

MR. MEL WEINBERG: How many were you knocking out a week?

MR. SOL KLAYMINC: Well, I was selling quite a bit. I was pulling in I would say, from ten to twenty a week—cash.

[28] MR. MEL WEINBERG: You're kidding.

MR. SOL KLAYMINC: All cash, yeah. An then, boom.

MR. MEL WEINBERG: At least you have a couple—a good years at that?

MR. SOL KLAYMINC: Mel, but it wasn't—you know, I had everything going. You know, I started this thing from zero, this business. Yeah, I was—at one point I was doing beautiful. I bought a—picked up a hundred thousand in bonds you know, picked up this apartment, started to roll, and then all of a sudden, boom, the business went bad, this—they took this away. Then, you know—

MR. MEL WEINBERG: You never found out who ratted on you?

MR. SOL KLAYMINC: I got the guy.

[29] MR. MEL WEINBERG: Oh, you know who it is?

MR. SOL KLAYMINC: Yeah.

MR. MEL WEINBERG: No kidding.

MR. SOL KLAYMINC: I know who it is. He was in court and all, and to save himself, you know, for a few hundred dollars, a thousand dollars at the most that he would have had to pay, he ratted.

MR. MEL WEINBERG: So why didn't you give him the thousand dollars or even better?

MR. SOL KLAYMINC: Well, they already put the squeeze in, and he's an Israeli, and these people I find I don't like to do business with.

MR. MEL WEINBERG: No kidding.

[30] MR. SOL KLAYMINC: They're bad people.

MR. MEL WEINBERG: You know, someone else told me that about them.

MRS. SOL KLAYMINC [BACKGROUND]: He snitched.

MR. SOL KLAYMINC: I don't tell them. You heard my wife. He snitched.

MRS. SOL KLAYMINC [BACKGROUND]: Snitch.

MR. SOL KLAYMINC: Oh, yeah,—I—

MR. MEL WEINBERG: Jeez. You're standing there with a—you know, it was only a thousand dollars they would have got him for?

MR. SOL KLAYMINC: Well, that and maybe they had something else, but he was the main one that the case—they were able to win the case.

[31] MR. MEL WEINBERG: Were—were you only caught once, or what?

MR. SOL KLAYMINC: I was caught the first time I was working for somebody doing that stuff. That's when I first got started. That was two years prior. See, they just walked in on me. I guess somebody else told; you know, there's always somebody. That's why you got to be careful. That's why if it's done in Haiti, then you got the thing wide open.

MR. MEL WEINBERG: How many can you figure to turn out in Haiti a week?

MR. SOL KLAYMINC: Oh, I could work it up to—I'll tell you something about my background, Mel. I'm

known as the top production man in the industry. Not bragging, okay?

MR. MEL WEINBERG: No, no.

MR. SOL KLAYMINC: In other words, if anybody can do it, I'll do it, you know. If—if you tell me, yes, I can give you twenty-five hundred each week, I'll give you twenty-five hundred each week.

[32] MR. MEL WEINBERG: Can you turn that many out.

MR. SOL KLAYMINC: Oh, sure.

MR. MEL WEINBERG: Is that the Gucci's too, or just the L.V.'s?

MR. SOL KLAYMINC: Yeah, well, anyone of 'em. It doesn't matter which one.

MR. MEL WEINBERG: Can you do the luggage too?

MR. SOL KLAYMINC: Of course. Well, luggage—I'll get somebody to make the luggage. You got to set up a different operation to do that, really, you know. Then it's only a question of getting machinery. You know when you got money behind you, Mel, that—

MR. MEL WEINBERG: —you can get anything.

[33] MR. SOL KLAYMINC: —you can get any type of machinery.

MR. MEL WEINBERG: You know, the only reason I'm asking—this is all new to me.

MR. SOL KLAYMINC: Right.

MR. MEL WEINBERG: —and I don't know a damn thing about it.

MR. SOL KLAYMINC: Right.

MR. MEL WEINBERG: But like I said, we can use you and we want to go ahead and we're going to go ahead, and we just got—we get together—

MR. SOL KLAYMINC: Definitely.

MR. MEL WEINBERG: —and we'll work it out, and you know, if anything like, you think of later—bring it out. We're not—look—

[34] MR. SOL KLAYMINC: We'll talk.

MR. MEL WEINBERG:—I don't give a damn if you were facing ten years.

MR. SOL KLAYMINC: Naah. Naah.

MR. MEL WEINBERG: No, I'm just telling you.

MR. SOL KLAYMINC: Yeah.

MR. MEL WEINBERG: That doesn't make any difference. I'm with you all the way or not with you.

MR. SOL KLAYMINC: Okay.

MR. MEL WEINBERG: I mean, I won't go to bed with you unless I can go all the way.

MR. SOL KLAYMINC: Okay, Mel.

[35] MR. MEL WEINBERG: So you understand.

MR. SOL KLAYMINC: I'm glad to hear it.

MR. MEL WEINBERG: So that doesn't make any difference. It's just that, you know, I never realized that they could do this to you, that, you know, these people went after you that bad.

MR. SOL KLAYMINC: Yeah, well, I was the kingpin. [LAUGHS].

MR. MEL WEINBERG: Well, that's what happens when you get too big.

MR. SOL KLAYMINC: Yeah, well, I should have—I could have slowed it down a little bit, but there was a time when one of my cohorts out in California—he fought them in court and he beat them; the judge ruled that their trademark was invalid, and that's when I really started to go gung-ho. And you know, I couldn't stop any more once I got that big.

[36] MR. MEL WEINBERG: No kidding.

MR. SOL KLAYMINC: And then six months later the judge turned the decision around.

MR. MEL WEINBERG: How the hell's this guy in Jersey get away with it?

MR. SOL KLAYMINC: Well, he does it very sly, very small. I mean, it doesn't compare to, you know, what I was doing.

MR. MEL WEINBERG: How many can he—was he —how many can the guy turn out?

MR. SOL KLAYMINC: He could probably turn out five hundred pieces a week, you know, capacity, you know.

MR. MEL WEINBERG: And they haven't caught him yet?

MR. SOL KLAYMINC: No. He jumps from one place to another, you know.

[37] MR. MEL WEINBERG: You mean, he moves his whole factory?

MR. SOL KLAYMINC: No, not his factory. He doesn't have his' own. He has this guy make one style, this guy would make one style, he has an answering service, nobody can take an order—give him an order unless you call his answering service, and I'm the only one who he gave his home number to.

MR. MEL WEINBERG: Ahhh. So he works in a small type of operation.

MR. SOL KLAYMINC: yes, a smaller, smaller operation.

MR. MEL WEINBERG: yeah, but doesn't he need the factories that see 'em?

MR. SOL KLAYMINC: What's that?

MR. MEL WEINBERG: What does he—subcontract everything out?

[38] MR. SOL KLAYMINC: Yeah. Right.

MR. MEL WEINBERG: Don't these factories get wise what he's doing?

MR. SOL KLAYMINC: Well, they're taking a little chance and they're getting paid for it.

MR. MEL WEINBERG: Oh, oh.

MR. SOL KLAYMINC: See? So that's why it's so high. That's why I say, made down there I can save at least twenty-five percent, and if I see a steady run, if I'm up to, let's say, twenty-five hundred or—three thousand or four thousand each week, I can even reduce the price.

MR. MEL WEINBERG: You know, one thing, you know—I don't know that much about pocketbooks, but you know, I looked at a real one and yours?

[39] MR. SOL KLAYMINC: Yeah.

MR. MEL WEINBERG: I couldn't tell the difference.

MR. SOL KLAYMINC: Of course. No, you can't. In fact, a lot of times if you go into Saks Fifth Avenue and you take a look at some of those, mine look better'n theirs.

MR. MEL WEINBERG: That's funny, you know it?

MR. SOL KLAYMINC: Now, you want to know something? When L.V. confiscated my goods, the lawyer said, "You know, the son of a bitch makes a good product?"

MR. MEL WEINBERG: Well, the—

MR. SOL KLAYMINC: "It looks good." Yeah.

MR. MEL WEINBERG: Well, that's a compliment.

[40] MR. SOL KLAYMINC: Well, I, I, I was in it long enough. I know.

MR. MEL WEINBERG: You should have told him, "Forget the case and give me a job."

MR. SOL KLAYMINC: [LAUGHS] I didn't need their job at that time. No, I was riding pretty high at one point, and in fact, only two years ago a guy offered me a million dollars for my business.

MR. MEL WEINBERG: No kidding.

MR. SOL KLAYMINC: And I wanted two and we—I said, "Look, I'm not hungry. We'll wait." And that's what happened.

MR. MEL WEINBERG: Yeah, well, hey, we're all smart.

MR. SOL KLAYMINC: Yeah.

[41] MR. MEL WEINBERG: You know, second-guessing. Who the hell knows what's happening a year from now?

MR. SOL KLAYMINC: You know what my wife said? My wife said, "Sol, I think God wants you to struggle hard, never have too much money, so you always keep—keep going, 'cause once you stop and slow down and retire, you'll be—you'll be a vegetable."

MR. MEL WEINBERG: That's true.

MR. SOL KLAYMINC. Maybe that's it.

MR. MEL WEINBERG: There's a lot of truth to that, Sol.

MR. SOL KLAYMINC: And I'm all excited. I feel I got a good ten years, you know. I'm sixty-four, but I got a good ten years. I can stay with the kids. My son can't keep up with me, even.

[42] MR. MEL WEINBERG: How long do you think the L.V.'s will still be popular in this country?

MR. SOL KLAYMINC: It could be good for another five years, but I would say a couple-a years but sure, but sure. If somthing would happen in six months, you still got a year to run before, you know, before everybody gets in on it.

MR. MEL WEINBERG: All right, I guess you answered most of my questions.

MR. SOL KLAYMINC: And it could be—I think it could be another five years, then years, you know. Like, three, four years ago, they said, "How long can this be good? Another year?" But the women keep buying. Every place you look, there's somebody wearing a bag.

MR. MEL WEINBERG: Yeah.

[43] MR. SOL KLAYMINC: And the blacks are into it, so they'll be buying it.

MR. MEL WEINBERG: Yeah, it's true. That's true.

MR. SOL KLAYMINC: Yeah, there's a big market out there, a tremendous market.

MR. MEL WEINBERG: They must make a fortune on their bags.

MR. SOL KLAYMINC: [LAUGHS] Oh. Are you kidding? Jesus Christ.

[MRS KLAYMINC SPEAKS IN BACKGROUND]: Yeah, Gucci wanted to discontinue the fabric and they're still running the same fabric.

MR. MEL WEINBERG: Gucci doesn't make their fabric. It's made in East Ger—in West Germany somewhere.

MR. SOL KLAYMINC: Well, wherever. Well, I made my connection with the Gucci fabric: I got up to forty-eight hundred yards of fabric that I could buy.

[44] MR. MEL WEINBERG: Oh, yeah? Beautiful.

MR. SOL KLAYMINC: From the guy on the West Coast. Now I'll—I'll start with the—and also the same party said if I want to make the L stuff scratch, from the scratch, it'd take sixty days, you know, to come the route that I told you, Japan, Hong Kong and here, or directly to Haiti.

MR. MEL WEINBERG: All right, this guy can order it for us?

MR. SOL KLAYMINC: Yes, he can order it.

MR. MEL WEINBERG: All right, what we'll do then, okay?—you give me—tell the guy I'm going to call him and let me know how much he wants down.

MR. SOL KLAYMINC: Hm hmm.

[45] MR. MEL WEINBERG: We'll get him the money out to order the stuff.

MR. SOL KLAYMINC: Yeah?

MR. MEL WEINBERG: All right?

MR. SOL KLAYMINC: No, he'll take my word for it. If I tell him to order it—

MR. MEL WEINBERG: Oh, he will?

MR. SOL KLAYMINC: Yes, my word is good enough with him. We—we dealt that way.

MR. MEL WEINBERG: Oh, because Nate—Nate told me, you know, that you need the money for it—

MR. SOL KLAYMINC: Yeah, right. It depends who and what. When you're talking about these guys—

[46] MR. MEL WEINBERG: Well, I'll tell you the truth. If we got to pay him anyway, what the hell difference does it make? Maybe you'd get a better deal if you pay him right away.

MR. SOL KLAYMINC: Oh, definitely. But I wouldn't maybe trust the guy to pay that type of money right away.

MR. MEL WEINBERG: Well, you know what we'll do?

MR. SOL KLAYMINC: You give him some on account—

MR. MEL WEINBERG: I'll give him some on account and I'll put in escrow with an attorney.

MR. SOL KLAYMINC: That's right. Something like that yes. Upon delivery you get the whole thing.

MR. SOL KLAYMINC: Okay.

[47] MR. MEL WEINBERG: All right?

MR. SOL KLAYMINC: Right.

MR. MEL WEINBERG: And you tell me—and order enough.

MR. SOL KLAYMINC: Right. Now, I'm going to try to get from the guy in Jersey enough to get started.

MR. MEL WEINBERG: Right.

MR. SOL KLAYMINC: And then order—

MR. MEL WEINBERG: Now that's the main thing. That he keeps us going.

MR. SOL KLAYMINC: Right, yeah. Right now I'll get him to keep you going. Let's—when I finish Tuesday if you give me some kind of order, you know, I'll say, "Okay give me a thousand" or give me two thousand," and I'll get this guy going and in two, three weeks he could have it.

[48] MR. MEL WEINBERG: All right.

MR. SOL KLAYMINC: And the same with the other guy out here in Florida. You know, these guys used to work with me on that stuff.

MR. MEL WEINBERG: Oh, oh, that's right—that's the Gucci guy in Florida.

MR. SOL KLAYMINC: One is the Gucci and the other one—is the L. It's better this way. This way your production'll be better because neither one can produce any real amounts. You know what I mean?

MR. MEL WEINBERG: Right.

MR. SOL KLAYMINC: Thy're not big operators.

MR. MEL WEINBERG: And they can be trusted, though.

[49] MR. SOL KLAYMINC: Yeah. No, I worked with them a long time, and there's no need for me to hand anything over until you get delivery.

MR. MEL WEINBERG: beautiful.

MR. SOL KLAYMINC: But the fact that I got both their home numbers—you have nothing to worry about, but they can be trusted, 'cause many's the time I owed them ten or fifteen and vice-versa, and we never worried.

MR. MEL WEINBERG: All right, I think your problems are solved, Sol.

MR. SOL KLAYMINC: Okay, Mel.

MR. MEL WEINBERG: All right? And I'll see you Tuesday. I'm going to be up there Sunday night, you know.

MR. SOL KLAYMINC: Oh, when are you flying in there?

* * * *

[57] MR. SOL KLAYMINC: Okay.

MR. MEL WEINBERG: Hey, I admire a man who tells me exactly. You didn't lie to me about the lawsuit—

MR. SOL KLAYMINC: I'll give you every—

MR. MEL WEINBERG: —you didn't lie to me—

MR. SOL KLAYMINC: —I don't lie about anything. I might forget something, but if you ask me, you know, anything, I'll tell you the truth. That's the way it is.

MR. MEL WEINBERG: You think you got a chance to collect that money from the lawsuit?

MR. SOL KLAYMINC: I definitely feel we got a good shot. But if I claim personal bankruptcy, that money will be in an estate to pay off. You understand?

[58] MR. MEL WEINBERG: Well, we got—we got—

MR. SOL KLAYMINC: —it depends how much you would collect. If I collect, let's say, if I could collect fifty percent, hell, I could more than pay off everybody and still have some left for myself. So that's—

MR. MEL WEINBERG: Well, did they make you an offer yet to settle?

MR. SOL KLAYMINC: No, but in the next couple of weeks I think they have to do something. They have to answer the charges.

MR. MEL WEINBERG: Oh, they have to answer the charges.

MR. SOL KLAYMINC: Right. So we'll—by that time, I guess, that's when they might want to make an offer.

MR. MEL WEINBERG: Yeah?

[59] MR. SOL KLAYMINC: But so far they haven't followed up with what I owe them, 'cause this way they didn't want to give me any—you know, six months ago when they gave me this and things were going real bad, I said to them, "Well, how about you reduce the interest rate or give me an extended term?" They said, "Nothing doing. If you can't make the payment, we'll take a judgment against you," you know. Well, I didn't make the payments and they didn't do a fucking thing after I gave them libel—the countersuit. They haven't once called me, "Hey, where's the payment?" or nothing. It's just laying in abeyance.

MR. MEL WEINBERG: Tough outfit, huh?

MR. SOL KLAYMINC: Well, they're tough, yeah, but right now I'm—I'm on top. I'm ahead of them, let's say, 'cause they know that my business is out, you know; where are they going to get paid? And meanwhile I got a two-and-a-quarter-million—they hate to see a suit of that size, you know, out, because if it gets out in the newspapers, it looks bad for the company.

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

TRANSCRIPT OF TELEPHONE CALL
FROM MR. MEL WEINBERG TO MR. SOL KLAYMINC

TAPE # 2

4/4/83

* * * *

[8] MR. SOL N. KLAYMINC: Okay.

MR. MEL WEINBERG: All right? Because I got to show the bank where I put the money.

MR. SOL N. KLAYMINC: I see. All right.

MR. MEL WEINBERG: I asked my attorney, this attorney that works for me, I got no problems and he can put it in my corporation.

MR. SOL N. KLAYMINC: Okay. Very good.

MR. MEL WEINBERG: All right?

MR. SOL N. KLAYMINC: Yeah.

MR. MEL WEINBERG: Who is the guy out in California?

MR. SOL N. KLAYMINC: His name is Jerry Young.

[9] MR. MEL WEINBERG: Jerry Young?

MR. SOL N. KLAYMINC: Right.

MR. MEL WEINBERG: All right. Long as he understands.

MR. SOL N. KLAYMINC: No, he'll understand. He—he's worked with the boys before, I think, in some way or another.

MR. MEL WEINBERG: All right, long as—

MR. SOL N. KLAYMINC: He's been around.

MR. MEL WEINBERG: Long as he understands where I come from. I'm not going to bother the guy.

MR. SOL N. KLAYMINC: Right.

MR. MEL WEINBERG: But all he knows that if I call him up I need material, he takes care of it.

MR. SOL N. KLAYMINC: Right.

[10] MR. MEL WEINBERG: Okay?

MR. SOL N. KLAYMINC: Right.

MR. MEL WEINBERG: And whatever we need to get production—

MR. SOL N. KLAYMINC: I need Haiti first—

MR. MEL WEINBERG: Haiti I'll just set up. You bring me—

MR. SOL N. KLAYMINC: No, but I want to go down there Wednesday.

MR. MEL WEINBERG: You can leave the—the Wednesday to go down.

MR. SOL N. KLAYMINC: This Wednesday I must straighten out there.

MR. MEL WEINBERG: Bring me the bills. Here's what you go to do.

MR. SOL N. KLAYMINC: Yeah.

MR. MEL WEINBERG: Everything you'll need to pay out there, bring [11] me the bills. We'll send checks out.

MR. SOL N. KLAYMINC: Yeah, a check'll be fine. And let's say—you can't send it to him. You could do two things. Either give it to my lawyer there, I got his card.

MR. MEL WEINBERG: All right, you give me all that information.

MR. SOL N. KLAYMINC: Right.

MR. MEL WEINBERG: I'll get you set up.

MR. SOL N. KLAYMINC: But putting it in writing don't mean a shit. You know, I got to explain all that.

MR. MEL WEINBERG: Let me explain the reason why, okay?

MR. SOL N. KLAYMINC: Go ahead.

MR. MEL WEINBERG: You know, I'm putting all this bread up for you.

MR. SOL N. KLAYMINC: Yep.

[12] MR. MEL WEINBERG: Okay? You're no youngster no more. All right?

MR. SOL N. KLAYMINC: Yeah, I feel young.

MR. MEL WEINBERG: I know, but you're like me. I can go tomorrow too.

MR. SOL N. KLAYMINC: Yeah.

MR. MEL WEINBERG: All right?

MR. SOL N. KLAYMINC: Yeah.

MR. MEL WEINBERG: I just want to protect my ass that the—God forbid if anything happens to you.

MR. SOL N. KLAYMINC: Yeah.

MR. MEL WEINBERG: All right? That these guys know they're dealing with me, to give us the material.

MR. SOL N. KLAYMINC: Oh yeah. Yeah.

[13] MR. MEL WEINBERG: And then your son could stay in Haiti with you. I don't want you to come back to the States. You run your business. We'll take care of everything else here.

MR. SOL N. KLAYMINC: Okay, fine.

MR. MEL WEINBERG: We'll bring it in with our planes. We'll pick it up directly from him.

MR. SOL N. KLAYMINC: Beautiful.

MR. MEL WEINBERG: Bring it in with our planes. There'll be no Customs or nothing.

MR. SOL N. KLAYMINC: Wow, that's great.

MR. MEL WEINBERG: All right?

MR. SOL N. KLAYMINC: Yeah.

MR. MEL WEINBERG: And this is what I want understood.

[14] MR. SOL N. KLAYMINC: Okay.

MR. MEL WEINBERG: Fair enough?

MR. SOL N. KLAYMINC: Right.

MR. MEL WEINBERG: I'm going to send you a thousand bucks tomorrow, you got it.

MR. SOL N. KLAYMINC: Okay. But we need—I want to get my own franchise. This guy, by not paying —you see, we're using his franchise—

MR. MEL WEINBERG: Whatever you need, you—

MR. SOL N. KLAYMINC: I got to explain all that to

you.

MR. MEL WEINBERG: I just told you about the franchise.

MR. SOL N. KLAYMINC: Right.

MR. MEL WEINBERG: You tell me—

[15] MR. SOL N. KLAYMINC: I need 5 G's for that and then you get it back.

MR. MEL WEINBERG: You give me a thing what you need it for, who the check's being made out to—

MR. SOL N. KLAYMINC: Right. Okay.

MR. MEL WEINBERG: My lawyers will take care of it.

MR. SOL N. KLAYMINC: Okay.

MR. MEL WEINBERG: Fair enough?

MR. SOL N. KLAYMINC: We'll call—we'll call that lawyer in Haiti tomorrow.

MR. MEL WEINBERG: No problem.

MR. SOL N. KLAYMINC: Okay? I'll tell them to set up an appointment for Wednesday. He's got the five thousand and he can proceed with the franchise and we don't need this black man in there.

[16] MR. MEL WEINBERG: Now, this guy, Young —gets the material for Louis Vuitton?

MR. SOL N. KLAYMINC: No, no, no. He doesn't get it from them. (LAUGHS SLIGHTLY)

MR. MEL WEINBERG: No, no, I'm tell—he's got the way to get it from . . .

MR. SOL N. KLAYMINC: Yeah, yeah. It goes through Japan and Hong Kong.

MR. MEL WEINBERG: Yeah, I don't give a fuck where he goes. Long as he can supply it.

MR. SOL N. KLAYMINC: Right. Right.

MR. MEL WEINBERG: All right?

MR. SOL N. KLAYMINC: Right.

* * * *

[22] MR. MEL WEINBERG: Well, when I sit with Jerry I want it out in the open. He knows your problem after he comes and says something later on.

MR. SOL N. KLAYMINC: No, there'll be no problems.

MR. MEL WEINBERG: No, no, I'm just telling it. Now we're going to take care of your problems. Even if it means I got to go to—what was that friggin' lawyer's name you mentioned?

MR. SOL N. KLAYMING: Uh . . . Bainton?

MR. MEL WEINBERG: Bainton?

MR. SOL N. KLAYMINC: Do you mean the LV lawyer?

MR. MEL WEINBERG: Yeah.

MR. SOL N. KLAYMINC: Yeah.

MR. MEL WEINBERG: Even if we've got to go and settle it to get [23] him off your back.

MR. SOL N. KLAYMINC: Well, uh . . . this guy, I told you, if we're suing him for two and a quarter, a million dollars, he'll probably want to settle for zero if I'd let him.

MR. MEL WEINBERG: All right. We'll get his—look, we'll get you squared away. We want you down in Haiti.

MR. SOL N. KLAYMINC: Yeah, that's where the money is.

MR. MEL WEINBERG: And out of trouble. And then we'll handle it from there. Now, we're getting—we're only own fifty percent of the business, right?

MR. SOL N. KLAYMINC: Okay.

MR. MEL WEINBERG: Fair enough?

MR. SOL N. KLAYMINC: That sounds good. I figured we'll discuss all that tomorrow.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

TRANSCRIPT OF AUDIO TAPE

TAPE 6A—12:00 p.m. to 12:55 p.m.

4-5-83

Meeting attended by Mel Weinberg, Sol Klaymine and Gunnar Askelund at Plaza Hotel.

[25] MR. MEL WEINBERG: That's a lot of money to be paying them.

MR. SOL KLAYMINC: Yeah. I asked if they could reduce the payments you know—stretch them out or reduce the interest. I think I was paying sixteen and a half percent interest. That's when interest rates started to fall. This was about a year ago. And no—nothing doin' if you miss one payment we're gonna take a judgment out, you know.

MR. GUNNAR ASKELUND: Umm. Hmm.

MR. SOL KLAYMINC: Anyway, the last three or four months or, you know, I told them, I can't pay you, okay.

* * * *

[49] MR. SOL KLAYMINC: Yeah. I asked if they could reduce the payments you know—stretch them out or reduce the interest. I think it was sixteen and a half percent interest. That's when interest rates started to fall. This was about a year ago. And no—nothing doin' if you miss a payment we're gonna take you [INAUDIBLE].

MR. GUNNAR ASKELUND: Umm. Hmm.

MR. SOL KLAYMINC: Anyway, the last three or four months or ya' know told them, I could pay you okay.

Then I—then I turned around and I countersued them. Ya' know they made a very bad article. I don't have a copy but my lawyers have it. Where they called me all kinds of names and all that. In fact, the guy's sorry like hell he ever put that in because since I sued them I—

[50] MR. GUNNAR ASKELUND: The Wall Street Journal's sorry?

MR. SOL KLAYMINC: No, well we didn't want to go with the Wall Street Journal because we thought they were too big an outfit. [INAUDIBLE] they can stretch you until God knows when. But these attorneys represent Louis Vuitton we sued them. The guy personally who made the article cost the company and they hate to have a suit against them. It doesn't look good.

MR. GUNNAR ASKELUND: Yeah.

MR. SOL KLAYMINC: He wanted to go to trial with them of course.

MR. GUNNAR ASKELUND: And you just did this?

MR. SOL KLAYMINC: Yeah, this is only about a month or so two months ago. And since I did this they—they're not sending—I mean they're not taking the judgment and they're doin' nothing.

[51] MR. GUNNAR ASKELUND: They're scared.

MR. SOL KLAYMINC: I have the feeling that they would be very happy to wipe the whole slate clean if I drop my suit, which I don't intend to do. Because the way it sits right now I might have to go personal. If I should win the big suit, they—they might take away that money coming in. So, you know [INAUDIBLE] talk to my lawyers.

MR. GUNNAR ASKELUND: What do you mean they take that money away from you. I don't understand.

MR. SOL KLAYMINC: I might have to go personal cause I got them on my back. I got CIT on my back—

MR. GUNNAR ASKELUND: Right. [INAUDIBLE].

* * * *

[34] MR. GUNNAR ASKELUND: He gets this overseas this material?

MR. SOL KLAYMINC: Yeah, it's made in Japan and goes to Hong Kong. They wrap it around with something to camouflage it.

MR. MEL WEINBERG: This is what you need? That's it?

MR. SOL KLAYMINC: Right.

* * * *

MR. MEL WEINBERG: You sign that and anything else you need just put it down.

[35] MR. SOL KLAYMINC: Alright, so we got here total investment and the [INAUDIBLE]. Okay, we need five thousand to payroll and then ten to twelve thousand for equipment. Okay? Let me put that down.

MR. MEL WEINBERG: Yeah, write whatever you need.

MR. SOL KLAYMINC: \$10,000 working capital, also —see I'm gonna show you how I'm fair—so this will make it twenty-five which is worth twenty-five percent, right?

MR. GUNNAR ASKELUND: Right.

MR. SOL KLAYMINC: I'm only going to put down ten thousand in equipment—

MR. GUNNAR ASKELUND: That's right.

[36] MR. SOL KLAYMINC: 'Cause I think that's all I'll need there.

MR. GUNNAR ASKELUND: Okay.

MR. SOL KLAYMINC: Now I need a double-dinker and—

MR. MEL WEINBERG: Hold it. Put down more, don't leave yourself—I'd rather ya put down—

MR. GUNNAR ASKELUND: Put down the twelve figure.

MR. MEL WEINBERG: Nah, put down more because if you need more—

MR. SOL KLAYMINC: Put down 20, \$20,000?

MR. MEL WEINBERG: Put down \$25,000 for equipment—if you don't take it, it doesn't make any difference.

[37] MR. SOL KLAYMINC: All right. Twenty-five thousand dollars.

MR. MEL WEINBERG: Put down you know—you may have to buy another machine.

MR. SOL KLAYMINC: In—in additional equipment.

MR. GUNNAR ASKELUND: Right, that'll include the freight and everything down there.

MR. SOL KLAYMINC: Yeah, twenty-five will do it. We got a big forty-foot trailer truck. It cost like 4200, somethin' like that.

MR. GUNNAR ASKELUND: All right.

MR. SOL KLAYMINC: Then you can move everything.

[38] MR. GUNNAR ASKELUND: Okay. Put it on a boat and go down there right?

MR. SOL KLAYMINC: Yeah, takes about 10 days. Plus \$10,000 working capital. Additional machines and equipment.

MR. GUNNAR ASKELUND: You like it down there in Haiti?

MR. SOL KLAYMINC: It could be very nice. If I had a nice successful thing going, y'know.

MR. GUNNAR ASKELUND: Could you live there?

MR. SOL KLAYMINC: You could live very nicely there.

MR. GUNNAR ASKELUND: Could you live there?

MR. SOL KLAYMINC: Well, I'm in Miami, y'know my home is down in Florida—

[39] MR. GUNNAR ASKELUND: Yeah.

MR. SOL KLAYMINC: And I could like ah a week ten days back to Miami and stay there.

MR. GUNNAR ASKELUND: What is it an hour and a half down there?

MR. SOL KLAYMINC: Yeah, an hour and a half flight. And then you go—

MR. MEL WEINBERG: Fill out this thing so we get this thing down with.

MR. SOL KLAYMINC: You want to read this?

MR. MEL WEINBERG: We got another meeting coming.

MR. SOL KLAYMINC: You want me to rewrite it?
It doesn't look, ah—

[40] MR. MEL WEINBERG: Nah, this is just it put
the date on there.

MR. SOL KLAYMINC: Today is four—

MR. GUNNAR ASKELUND: Five.

MR. SOL KLAYMINC: Okay total investment 100,000
on plant and equipment. Four partners with equal shares
[INAUDIBLE] machines plus 10,000 in working capital.
Okay, the word capital is payroll.

MR. MEL WEINBERG: Alright, now we gonna give
you now a \$1,000 of payroll, mark down so it shows that
I paid it to you. Put it down on another piece of paper.

MR. SOL KLAYMINC: Smaller piece?

[41] MR. MEL WEINBERG: You can put it on a big
piece this is just going to them. Nobody sees it.

MR. SOL KLAYMINC: Should I put received?

MR. MEL WEINBERG: Received \$1,000 for payroll
—and I don't need a receipt for the bags.

[PARTIES SPEAKING TOGETHER]

MR. MEL WEINBERG: All right, you give me a
receipt tonight for the five because I didn't give you the
five yet.

MR. SOL KLAYMINC: So you want to add this on
today, sign this and then sign again—or do you wanna
leave it—

MR. MEL WEINBERG: You sign that and ah—

[42] MR. SOL KLAYMINC: All right, I'll sign this
and tonight I'll sign the other.

MR. GUNNAR ASKELUND: Right. [MR. ASKE-
LUND COUNTING MONEY]

MR. SOL KLAYMINC: I know how to build up the
business.

MR. MEL WEINBERG: Hey, I put faith in you
didn't I? Let me tell you something Sol, we'll never
bother you, just get us our bags.

MR. SOL KLAYMINC: Now what do ya—how many do you feel you need during the year let's say for next year.

MR. MEL WEINBERG: I use twenty-five hundred a month and if I need more I'll have to let you know.

[43] MR. SOL KLAYMINC: That'll be fine. Between—

MR. MEL WEINBERG: —and another thing. I want a meeting set up, if we don't do this right away, we can do this after you get back from maybe California. I want a meeting set up with George. You sure there's a thousand there?

MR. GUNNAR ASKELUND: Ah that six-twenty I'm paying for the bags—six-twenty-five—count—count that—

MR. MEL WEINBERG: We running out of money there—we got any money left?

MR. GUNNAR ASKELUND: Let me give you this here. We'll have the ticket tonight. That's basically it. I think it gets in like 9 o'clock or something.

[44] MR. MEL WEINBERG: We got any money left there?

MR. GUNNAR ASKELUND: Yeah, why?

MR. MEL WEINBERG: Cause I got more coming up.

MR. SOL KLAYMINC: You goin' have a round-trip for me?

MR. MEL WEINBERG: Yeah, round-trip first class.

MR. SOL KLAYMINC: I'll come back to ah—

MR. MEL WEINBERG: West Palm.

MR. SOL KLAYMINC: West Palm? They go to West Palm?

MR. GUNNAR ASKELUND: No, it's to Miami.

[45] MR. MEL WEINBERG: I thought it was West Palm.

MR. GUNNAR ASKELUND: No, Miami, I think it's a direct flight to Miami.

MR. MEL WEINBERG: There's none to West Palm? Well, whatever it is—West Palm, Miami—I don't know.

MR. GUNNAR ASKELUND: It looks like you got a nice tan. You been out hittin' that little white one?

MR. MEL WEINBERG: Now you got a Jewish bank roll.

MR. GUNNAR ASKELUND: I like it when I get a chance to golf. What's your handicap?

MR. SOL KLAYMINC: About fifteen. I'm a big crook.

MR. GUNNAR ASKELUND: They call you crook? You're really a ten right?

MR. SOL KLAYMINC: I used to be a seven, eight. I love the game. But you know, when your mind is not on the game, forget it.

MR. MEL WEINBERG: Is that right?

MR. SOL KLAYMINC: True [COUNTING]. Okay now, I need to protect myself against these people because you know I had a to-do with them several times. I got to make sure I don't expose myself to them again because it would be a criminal action.

MR. GUNNAR ASKELUND: Right.

MR. SOL KLAYMINC: So how do we protect it? Like what he was saying, if I have my friend ship it to Haiti, he says there's no problem to get the goods there.

[47] MR. GUNNAR ASKELUND: Right.

MR. SOL KLAYMINC: Can you fly into Haiti? [INAUDIBLE]

MR. MEL WEINBERG: We'll take care of it.

MR. SOL KLAYMINC: If you fly it in, fly it out. I don't think there'll be any problem.

MR. GUNNAR ASKELUND: That's no problem.

MR. MEL WEINBERG: No problem, let me tell you something [INAUDIBLE] when you meet with, what's his name Young?

MR. SOL KLAYMINC: Jerry Young.

MR. MEL WEINBERG: All right. Our plane when they come in, our attorney there will pay him the cash.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

TRANSCRIPT OF PROCEEDING

Before:

HON CHARLES L. BRIEANT,

District Judge.

April 6, 1983
2:00 p.m.
* * * *

[2] THE COURT: Mr. Bainton, you may be heard.

MR. BAINTON: Thank you, your Honor. While you were out of the district I presented an unusual application to Judge Lasker, who was the emergency judge. He granted the application and suggested that I come down and speak with you about it at the earliest opportunity.

Your Honor may recall—and by the way, your Honor, the order signed by Judge Lasker was kept filed under seal.

THE COURT: Where does it say that?

MR. BAINTON: The last discretal paragraph, your Honor.

The order appoints Mr. Devlin and myself to investigate and ultimately to prosecute alleged criminal contempt of this Court's order by one Sol Klaymine, Karen Handbag, Jade Handbag and others.

THE COURT: This is a second contempt?

MR. BAINTON: Yes, sir. My affidavit shows, and is now somewhat out of date, that Mr. Klaymine has established a factory in Haiti.

Once we were appointed we advised private investigators who were working for us that they were agents

of the government and bound by all of the restrictions that that embodies, but also that they were at liberty to tape record certain telephone conversations [3] and tape record certain meetings.

Your Honor, may I continue this in an empty room, please?

THE COURT: Would the gentleman who entered be good enough to tell me who you are?

MR. KOPIT: William Kopit, counsel for the American Hospital Association.

THE COURT: You may sit down. As a general matter, I don't hold in camera proceedings. If you want to keep something secret, the best thing is to report it in the afternoon because all the reporters go to lunch and they don't come back. They don't work quite the same hours that I do.

Please proceed.

MR. BAINTON. In any event, your Honor, meetings were had yesterday at the Plaza and telephone conversations have been recorded. They have established conclusively that Mr. Klayminc has continued to be engaged in conduct proscribed by this Court. He has delivered to us 25 bags and has asked for \$100,000 investment in the Haitian operation. A meeting has been scheduled for next Thursday in Beverly Hills to meet with the fabric supplier. The fabric supplier, your Honor, is Mr. Jerry Young, a participant in a case called Vuitton, S.A. [4] vs. General Enterprises.

THE COURT: That is the case that Judge Reale had?

MR. BAINTON: That is correct, your Honor. However, Mr. Young has indicated that he is well aware of this Court's order and of Mr. Klayminc's recent problems in this courthouse. You will recall that he was convicted of criminal conduct roughly six to nine months ago.

THE COURT: Is he still on probation?

MR. BAINTON: Yes, he is.

THE COURT: It occurs to me—perhaps I ought to wait until you finish your presentation, but it occurs to me that you ought to notify the United States Attorney's office of what is going on here because it may reach a serious enough level that that office may regard itself as directly concerned. It is not my conclusion. That is just an observation. It seems to me it would be appropriate to make a disclosure to the chief of the criminal division at the office of the U.S. Attorney in this district, and if they ask for any additional information or further co-operation, naturally it would be your duty to accommodate those requests.

What is your present request of this Court?

MR. BAINTON: Your Honor, I have no present request. I gave Judge Lasker my word that I would meet [5] with you to bring to your attention the existence of the order that he signed, the nature of the investigation which is presently being conducted, and I am simply honoring my word to Judge Lasker.

THE COURT: I would like you to arrange for full debriefing of your information to the United States Attorney's office. If they refuse to hear it, it is not in the nature of a direction on my part that they must, but I think a certain degree of coordination would be appropriate here because from what has been set forth in the papers and from what you say, the matter is more serious than the typical violation of the sort which is commonly referred to in this district as the T-shirt cases.

MR. BAINTON: Yes, sir.

THE COURT: I know that this is not a T-shirt case but that is the ordinary type of commercial violation and it seems to have gone quite beyond it if you have a probationer who is violating.

So I think you should do that. That is only a suggestion not a mandate of the Court.

MR. BAINTON: Your Honor, I will of course take your suggestion and see that it is done this afternoon.

May I ask your Honor, consistent with Judge [6] Lasker's order, that the transcript of these proceedings be kept sealed pending order of this Court?

THE COURT: Yes, but accessible to the U.S. Attorney's office and to your office also.

MR. BAINTON: Thank you, your Honor.

THE COURT: Thank you, gentlemen.

(Court adjourned)

REBOUL, MACMURRAY, HEWITT, MAYNARD &
KRISTOL
45 Rockefeller Plaza
New York, N.Y. 10111

April 6, 1983

Lawrence Pedowitz, Esq.
Chief, Criminal Division
Office of the United States Attorney
One St. Andrew's Plaza
New York, N.Y. 10007

United States of America, ex rel.,
Vuitton et Fils S.A.
v. Karen Bags, Inc., et al.
78 Civ. 5863 (CLB)

Dear Mr. Pedowitz:

At the suggestion of Judge Brieant, I am bringing to your attention an order signed by Judge Lasker in Judge Brieant's absence in the above-entitled criminal contempt proceedings, together with an affidavit of mine submitted in support of that order.

The criminally contumacious events predicted in my affidavit have come to pass. Should anyone from your office have any interest in this matter I am obviously willing to make the tape recordings and other evidence available for your review in a manner which will not compromise its chain of custody.

Very truly yours,

/s/ J. Joseph Bainton
J. JOSEPH BAINTON

JJB:Di
Enclosures

Copy to Hon. Charles L. Brieant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

TRANSCRIPT OF TELEPHONE CALL

TAPE 11

4/8/83, 8:15 A.M.

* * * *

[7] MR. MEL WEINBERG: Yeah, well, that's what I told him to do, arrange, see what they want, and take care of that, get to lawyer down there and buy 'em out.

MRS. SYLVIA KLAYMINC: Uh-huh. Sure.

MR. MEL WEINBERG: Well, you should be back in business within a few months.

MRS. SYLVIA KLAYMINC: Well, it would be nice.

MR. MEL WEINBERG: Ah?

MRS. SYLVIA KLAYMINC: It would be nice.

MR. MEL WEINBERG: Then you can go back selling 'em again.

MRS. SYLVIA KLAYMINC: No, I won't be able to do it here.

MR. MEL WEINBERG: Why?

[8] MRS. SYLVIA KLAYMINC: Ah, you're not allowed to here, I mean in the U.S.

MR. MEL WEINBERG: Well, we'll ship you to Europe, then.

MRS. SYLVIA KLAYMINC: Well, that's not a bad idea either. [LAUGHS].

MR. MEL WEINBERG: That's what we'll do.

MRS. SYLVIA KLAYMINC: Well, we'll see what the future brings. But there's a tremendous market for it.

MR. MEL WEINBERG: No kidding.

MRS. SYLVIA KLAYMINC: Oh, sure.

MR. MEL WEINBERG: I don't know anything about this business. See, we just owned the casinos and all the—and the stores and the casinos.

MRS. SYLVIA KLAYMINC: Right.

[9] MR. MEL WEINBERG: And our problem we're going in is the high-rollers come in, you know, and they're on comp[?] and they want to buy their girlfriend a bag. Boy, it's not bad that they owe us money from what they lost or they beat us; then they come in and they buy a two- three-hundred-dollar bag and they sign for it and they never pay.

MRS. SYLVIA KLAYMINC: Oh, I see. Oh, my.

MR. MEL WEINBERG: You've been to Vegas. You know what it's like.

MRS. SYLVIA KLAYMINC: Sure.

MR. MEL WEINBERG: So this is what we're knocking 'em out for.

MRS. SYLVIA KLAYMINC: I see. I see.

MR. MEL WEINBERG: And then we have other stores throughout the country, but—

MRS. SYLVIA KLAYMINC: Uh-huh, but not the U.S.

[10] MR. MEL WEINBERG: We have two casinos only in the U.S. We try to stay—and those stores are sold outright. You get big money for them.

MRS. SYLVIA KLAYMINC: I see.

MR. MEL WEINBERG: The other, the overseas, you own the stores. You got a captive audience.

MRS. SYLVIA KLAYMINC: Sure.

MR. MEL WEINBERG: And like we got the one in Monte Carlo—

MRS. SYLVIA KLAYMINC: Oh, uh-huh.

MR. MEL WEINBERG: And that's a captive audience. That's one of the best ones out.

MRS. SYLVIA KLAYMINC: Sure.

MR. MEL WEINBERG: They buy anything.

[11] MRS. SYLVIA KLAYMINC: How about Puerto Rico?

MR. MEL WEINBERG: We have one down there.

MRS. SYLVIA KLAYMINC: Uh-huh, because there is also a captive audience.

MR. MEL WEINBERG: Well, Puerto Rico is—the islands are dying down in gambling now. It's not going that great. Puerto Rico we got problems with the muggings, papers played it up, St. Martine people don't care to travel, it's too expensive, the cruise-ship business is fallen off a touch—

MRS. SYLVIA KLAYMINC: How about a place like Curacao?

MR. MEL WEINBERG: No, we're in St. Martine, Barbados—trying to think of some of the other islands there.

MRS. SYLVIA KLAYMINC: Aruba?

MR. MEL WEINBERG: Aruba we have a place. See, but I think in [12] Aruba you got the Holiday Inn there.

MRS. SYLVIA KLAYMINC: How about Yugoslavia? Are you in Yugoslavia?

MR. MEL WEINBERG: Yugoslav was owned by Penthouse and was closed down.

MRS. SYLVIA KLAYMINC: Oh.

MR. MEL WEINBERG: Yeah, that was closed down. The government took his license away because of financial—they wanted too much, you know. It's a—

MRS. SYLVIA KLAYMINC: The cut[?], you mean?

MR. MEL WEINBERG: It's a Communist-run country.

MRS. SYLVIA KLAYMINC: I know.

MR. MEL WEINBERG: And I was speaking to Gucione and he told me that they just demanded too much.

[13] MRS. SYLVIA KLAYMINC: You know, it's a funny thing: coming down here the last time, I was coming here alone and I was sitting next to a lady, very

lovely ladey, and she was talking to me and talking to me—Bob Guccione's aunt.

MR. MEL WEINBERG: No kidding.

MRS. SYLVIA KLAYMINC: And she says he's such a good guy. I mean, he really has treated her very well.

MR. MEL WEINBERG: Yea, a lot of people would argue that with you.

MRS. SYLVIA KLAYMINC: Well, she says, her husband—I think it's her husband's nephew, I believe, and her husband passed away, and she was telling me—

MR. MEL WEINBERG: He built some empire up. He built some empire up with that magazine.

MRS. SYLVIA KLAYMINC: And how. And how. Good for him. He didn't [14] take anything from, you know, the average person and he gave a very nice product. I enjoy reading *Penthouse*; so a lot of people do, too.

MR. MEL WEINBERG: But you know, I meant to ask Sol, 'cause I wanted to meet your son, you know, 'cause he's going to be active in it, right?

MRS. SYLVIA KLAYMINC: Well, I would imagine he's going to help him, you know, and—

MR. MEL WEINBERG: Well, according to Sol, he said he's going to run the production.

MRS. SYLVIA KLAYMINC: Yeah, yup.

MR. MEL WEINBERG: So—

MRS. SYLVIA KLAYMINC: He's going to—he does everything, you know, purchasing and all that, too. I mean, there's an awful lot, you know, that goes into the whole [15] thing. But you know, that's up to them. I'm strictly an outsider when it comes to that. I mean, as far as production and things like that, I was active in the business but not in that part of it.

MR. MEL WEINBERG: What, the sales part?

MRS. SYLVIA KLAYMINC: In sales, yes. Yes. You know, the little home kind of sales [LAUGHS].

MR. MEL WEINBERG: That's the best type.

MRS. SYLVIA KLAYMINC: Oh, I enjoyed it. I enjoyed it.

MR. MEL WEINBERG: You know, there's more money in that. I was speaking to a guy that came up to sell us some shirts, right? And he was telling me that his sister sells them in Pittsburgh and does seven thousand dollars a week.

MRS. SYLVIA KLAYMINC: What kind of shirts?

[16] MR. MEL WEINBERG: The Polo's.

MRS. SYLVIA KLAYMINC: Oh, the Polo's. I had a friend who was doing that.

MR. MEL WEINBERG: I couldn't believe it. I says, "Seven thousand a week?"

MRS. SYLVIA KLAYMINC: I didn't think you could make that much.

MR. MEL WEINBERG: Yeah, he says that's what she's making. I mean, he could be lying to me.

MRS. SYLVIA KLAYMINC: I could be. Maybe he wanted to push it, you know.

MR. MEL WEINBERG: And you know, it's hard to believe, seven thousand. He was telling me seven thousand a week.

MRS. SYLVIA KLAYMINC: I don't think that's—I don't think that's possible, really, but—

[17] MR. MEL WEINBERG: He also told us in the farmers' market down in Florida that they did anywhere from five to twelve thousand a weekend.

MRS. SYLVIA KLAYMINC: On the shirts?

MR. MEL WEINBERG: Yeah.

MRS. SYLVIA KLAYMINC: I don't know.

MR. MEL WEINBERG: I mean, I'm not in the retail, so you know, they can tell me anything, but that sounds like a lot of shirts.

MRS. SYLVIA KLAYMINC: Right. It is a lot of shirts. I can't see, but look, anything is possible, unless he was looking to impress you.

MR. MEL WEINBERG: He's not impressing me because we have our own plant in Guatemala that knocks 'em out.

MRS. SYLVIA KLAYMINC: The Polo's.

[18] MR. MEL WEINBERG: Yeah. We have our own plant. In fact, we just got a—I'm looking for an embroiderer down here, 'cause the guy we got's in Jersey, New York, and that means I got to ship all the stuff up there.

MRS. SYLVIA KLAYMINC: You mean, to put that little gimmick on?

MR. MEL WEINBERG: Yeah.

MRS. SYLVIA KLAYMINC: —gimmick on?

MR. MEL WEINBERG: Yeah. But apparently that's what they do. The housewives make the big money.

MRS. SYLVIA KLAYMINC: Sure. Sure. They have—

MR. MEL WEINBERG: What did you have, like, Tupper parties?

MRS. SYLVIA KLAYMINC: Well, right. They don't have the overhead, you know. They make the parties, they serve [19] coffee and cake, and the women come and buy.

MR. MEL WEINBERG: Well, I guess on your end all the—

MRS. SYLVANIA KLAYMINC: Oh, no, I didn't do that. I sold to people who did that, you know what I mean?

MR. MEL WEINBERG: Oh. Oh, you had all the housewives going out for you.

MRS. SYLVANIA KLAYMINC: No, not for me. They would come and buy my goods and do what they wanted with it.

MR. MEL WEINBERG: Oh, then they went out and sold them.

MRS. SYLVIA KLAYMINC: Then they went out and sold it. But that's something I wouldn't touch now, not in the U.S.

MR. MEL WEINBERG: All right, we could arrange it for overseas for you. Well, you'll be active in the business anyway from the way Sol spoke.

[20] MRS. SYLVIA KLAYMINC: Oh, well, definitely, definitely. I mean, listen, I know how to keep books and

things like that, and I've been active with him, you know, for about ten years now, and I'm getting a little tired of just lounging around doing nothing, you know, except keeping house, which I haven't done in years. So I'll definitely get back into something, but in the meantime it's like a little vacation for me, so you know, it's not so terrible. But I haven't been a housewife in a long time, and I am now for a while.

MR. MEL WEINBERG: Look, we'll have you back inside in a little while.

MRS. SYLVIA KLAYMINC: Okay, sounds good.

MR. MEL WEINBERG: And everything will, you know, get back in the swing.

MRS. SYLVIA KLAYMINC: Sure. You're—

[21] MR. MEL WEINBERG: Your husband's quite a fellow.

MR. MEL WEINBERG: Oh, yes. Oh yes. Of course I am very subjective about it. I mean, having lived with him for a good many years—but I've been told that by a lot of people, and he's a hustler, he's a go-getter, and he gets it done.

MR. MEL WEINBERG: I told him up there, you know, that that lawsuit he's got, you know, that at least be smart enough to bury things that he—that, you know, they don't come in.

MRS. SYLVIA KLAYMINC: Yeah, well, that's—I don't think he has any problem there.

MR. MEL WEINBERG: Well, you know, I tried to explain to him, if he has any cash or anything, you know, that they can come after him for that. You know, like even the house—to put it in someone else's name.

[22] MRS. SYLVIA KLAYMINC: No, well, I don't think he has any problem with that. You know, when it comes to finances, it's all his headache; I only do the minimal things around the house.

MR. MEL WEINBERG: Well, no—well, I'm trying to bring out, though, that once this goes in, we're pouring

money in and all like that, it's going to be done overseas so they can't touch it there—

MRS. SYLVIA KLAYMINC: That's the nice part of it.

MR. MEL WEINBERG: —right, but what he's got to be careful of—anything he brings into the States, that they don't get wise, because they'll be looking for. . .

MRS. SYLVIA KLAYMINC: You mean, that stuff? He's not going to—

MR. MEL WEINBERG: No, no. No, no, I'm talking about money.

MRS. SYLVIA KLAYMINC: Oh, oh, I see what you mean. Listen, as far [23] as that's concerned, there's always a hiding place.

MR. MEL WEINBERG: Well, that's what I'm saying: He's got to be smart on the hiding place.

MRS. SYLVIA KLAYMINC: Oh, of course. I don't think he'll have to worry about that, believe me.

MR. MEL WEINBERG: Well, you know, we washed millions and millions of dollars.

MRS. SYLVIA KLAYMINC: Right.

MR. MEL WEINBERG: —a day, and I told him you can never be too smart.

MRS. SYLVIA KLAYMINC: No, nobody can.

MR. MEL WEINBERG: You got to be careful as can be.

MRS. SYLVIA KLAYMINC: Of course.

[24] MR. MEL WEINBERG: You know, some people think safe deposit boxes are safe; they're not really safe either.

MRS. SYLVIA KLAYMINC: No, that's true, but you know, there's such a thing as a little home safe and things like that.

MR. MEL WEINBERG: Yeah, that's the safest thing out.

MRS. SYLVIA KLAYMINC: Well, we used to, you know, years back—we had a home in Westbury, and we had a safe in the wall, and it was a nice little gadget to

have—not that we had much to put into it, but you know, the few pieces of jewelry and things like that that I had. It was very convenient having it there. Of course when we left we didn't take it with us, naturally (it was in the wall), but it was an added incentive to the people we sold the house to. They were thrilled when they saw it, you know. It's a nice little thing to have, and it's fireproof.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

TRANSCRIPT OF TELEPHONE CALL
SOL N. KLAYMINC AND MEL WEINBERG

TAPE #19
4/9/83, 1:45 P.M.

* * * *

[28] MR. MEL WEINBERG: All right.

MR. SOL N. KLAYMINC: Okay, so meanwhile I . . .

MR. MEL WEINBERG: But I want—can he get us a guarantee of a year's supply in this?

MR. SOL N. KLAYMINC: Oh sure.

MR. MEL WEINBERG: That's what we want set up.

MR. SOL N. KLAYMINC: Well if you want a setup like backup, you know . . .

MR. MEL WEINBERG: Yeah.

MR. SOL N. KLAYMINC: In other words, we'll give 5,000, I want a backup a month from now . . .

MR. MEL WEINBERG: Are you—well, you've got to tell me how much we need a month.

MR. SOL N. KLAYMINC: Okay.

[29] MR. MEL WEINBERG: All right?

MR. SOL N. KLAYMINC: That depends how much you want to order a month.

MR. MEL WEINBERG: Well, how much we need enough to knock out and 5,000 bags I need, what do you want for yourself?

MR. SOL N. KLAYMINC: No, I don't want—I'm not going to make it for myself. Cause I can't take it in here. I wouldn't take a chance.

MR. MEL WEINBERG: But you could ship to other countries.

MR. SOL N. KLAYMINC: I—I could, but . . .

MR. MEL WEINBERG: Yeah.

MR. SOL N. KLAYMINC: But I don't want to do it on my own, unless you give me help or something like that.

MR. MEL WEINBERG: All right. We'll give you help to get it out then.

[30] MR. SOL N. KLAYMINC: Well, then why don't you want to do it? I'd just as well you make the money and let me make the difference. So you'll make the big bread. If you got the connections to ship it out and have the customers for it I'll let you make that difference in the profit.

MR. MEL WEINBERG: All right. Fair enough.

MR. SOL N. KLAYMINC: I'm not that greedy.

MR. MEL WEINBERG: Fair enough.

MR. SOL N. KLAYMINC: I just want to know I got a little bit on each bag I make.

MR. MEL WEINBERG: All right, so you figure how much you need for 5,000 bags a month.

MR. SOL N. KLAYMINC: We're talking about material.

MR. MEL WEINBERG: Yeah.

[31] MR. SOL N. KLAYMINC: Five thousand a month, you need maybe 2,000 yards.

MR. MEL WEINBERG: A month.

MR. SOL N. KLAYMINC: Yeah.

MR. MEL WEINBERG: All right. That's what we got to get from Jerry.

MR. SOL N. KLAYMINC: Okay.

MR. MEL WEINBERG: We want to get 3 months, 3 months in advance.

MR. SOL N. KLAYMINC: Three months in advance you've got to get, right.

MR. MEL WEINBERG: So you need 6,000, we'll say 8,000 yards.

MR. SOL N. KLAYMINC: Right.

MR. MEL WEINBERG: Okay? And then you need, after that, 2,000 every month.

MR. SOL N. KLAYMINC: Right. But they won't give you 2,000.

[32] MR. MEL WEINBERG: You got to take how many?

MR. SOL N. KLAYMINC: Five thousand's the minimum they'll make.

MR. MEL WEINBERG: So you take 5,000 every two —four—uh, 2 months.

MR. SOL N. KLAYMINC: Every 2, 3 months you take—one time you wait two months, the next time you wait three months.

MR. MEL WEINBERG: You don't have to wait nothing, you'll be using your material.

MR. SOL N. KLAYMINC: Okay.

MR. MEL WEINBERG: All right?

MR. SOL N. KLAYMINC: Yeah. So the first shot of 5,000 I'll go along with George in. And I'll help him make half of it.

MR. MEL WEINBERG: Yeah.

MR. SOL N. KLAYMINC: This way you could be sure that you got your [33] merchandise.

MR. MEL WEINBERG: All right.

MR. SOL N. KLAYMINC: I'll have him cut half to send me, and half he'll make with his people.

MR. MEL WEINBERG: Fair enough.

MR. SOL N. KLAYMINC: Okay?

MR. MEL WEINBERG: Fair enough.

MR. SOL N. KLAYMINC: Good. So I can put that down as an order Mel?

MR. MEL WEINBERG: Yeah.

MR. SOL N. KLAYMINC: All right, then I'll talk—I'll talk to him now. He's going to say Sol, how can I commit myself for 5,000 pieces? I need a little bread. Okay?

[34] MR. MEL WEINBERG: No. I will not give him a—bread—if—let me meet with George first. Maybe if I see the guy is a—is a—you know, he's like you . . .

MR. SOL N. KLAYMINC: Listen to me, listen.

MR. MEL WEINBERG: Yeah.

MR. SOL N. KLAYMINC: If you give me something—if I tell him George I got 10 I'm holding for you, the moment you ship me 500 bags you got more money. You ship me another 500 bags, you got more money. I want to assure him. These guys'll work with me because they worked with me before. 10,000. . .

MR. MEL WEINBERG: I will put any amount of money they want in escrow with attorneys.

MR. SOL N. KLAYMINC: Okay, but you don't understand. They got to pay the payroll. They got to have expenses. They got to pay for the material, they got to pay for the printing.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

TRANSCRIPT OF TELEPHONE CALL
MR. MEL WEINBERG (IN CALIFORNIA)
RETURNS MR. BARRY KLAYMINC'S CALL

TAPE 30

4/12/83, 6:48 P.M.

* * * *

[9] MR. MEL WEINBERG: —yeah—

MR. BARRY KLAYMINC: —3420.

MR. MEL WEINBERG: —3420.

MR. BARRY KLAYMINC: Okay, and I spoke to him also; I'll speak to him again and I'll tell him it'll be, you know, sometime next week also.

MR. MEL WEINBERG: Yeah, what—how much stuff has he got there, about?

MR. BARRY KLAYMINC: Well, you got the shelving, you got any of the machines, you know, we got out earlier—you know, really, I can't tell you. I think I could get a better estimation from Larry on really what he's got out there, 'cause he—what's that?

MR. MEL WEINBERG: It makes no difference, but I'll need a big truck, right?

[10] MR. BARRY KLAYMINC: Oh, yeah, definitely, 'cause you know, those boxes alone, which, you know—you got a lot of leather in those boxes, you know—that'll take up a lot of, you know, room, of course.

MR. MEL WEINBERG: Any of the stuff for the Louis Vuitton there?

MR. BARRY KLAYMINC: What?

MR. MEL WEINBERG: Any of the stuff for the pocketbooks—?

MR. BARRY KLAYMINC: Well, the machinery, of course, will be used for that, but the leather is that softer leather, you know, we used, you know, for those other bags. But you know, the other machinery we definitely can use, you know, for the L. program.

MR. MEL WEINBERG: All right, now, long as I got you on the phone, all right—?

MR. BARRY KLAYMINC: Yeah.

[11] MR. MEL WEINBERG: —you're going to be working for Pop, right?

MR. BARRY KLAYMINC: Yeah, sure.

MR. MEL WEINBERG: All right, what is your capacity? You know, we get to know each other.

MR. BARRY KLAYMINC: As far as what?

MR. MEL WEINBERG: Well, what did you do before for Pop?

MR. BARRY KLAYMINC: Oh well, like, everything from fixing machines to working with the biggest buyers, I mean, you know, selling-wise. I mean, I ran the whole gamut. I started out, you know, literally sweeping the floors, and you know, I was—you know, supervised, worked on machines, fixed machines, went out selling—you know, the whole deal. So there's no part of the business I don't know—put it that way.

MR. MEL WEINBERG: Now, are you able to take over for us and make [12] the L's down in Haiti?

MR. BARRY KLAYMINC: Oh, no problem.

MR. MEL WEINBERG: All right, and you know all about how to make 'em?

MR. BARRY KLAYMINC: Oh, yeah.

MR. MEL WEINBERG: And you did it up here?

MR. BARRY KLAYMINC: Oh, yeah.

MR. MEL WEINBERG: Oh, you did it up here, so you know about 'em.

MR. BARRY KLAYMINC: Yeah, no problem.

MR. MEL WEINBERG: All right, 'cause I didn't know that you did it up here or not.

MR. BARRY KLAYMINC: In fact, you know, comes out I'll look forward to doing the cutting and stuff on that, 'cause [13] you know, I used to get a little enjoyment out of, you know, getting the best, you know, out of it that you could, you know, the best yield, if you know what I'm saying, and oh yeah, you know, I mean, I'm definitely fully versed on, you know, the whole operation and, you know, how everything goes.

MR. MEL WEINBERG: Well, I didn't know if you were involved the last time in it.

MR. BARRY KLAYMINC: Well, yeah. I mean, was really more out in sales. I mean, I've basically been more out in sales, but I know the whole production. I mean, I had like, you know, four, five years in the production end of it also, so you know, I really—I know, you know, machines from "A" to "Z" so—

MR. MEL WEINBERG: So you know how to make the cut and—?

MR. BARRY KLAYMINC: Oh, yeah.

[14] MR. MEL WEINBERG: And you know the material we need for the L's?

MR. BARRY KLAYMINC: Oh, yeah. Yeah.

MR. MEL WEINBERG: So I mean—

MR. BARRY KLAYMINC: I don't think, Mel, once—you'll have no concern with, you know, like, quality and once we get rolling, you know, the, you know, expediting it, and you know, really getting things moving. I mean, I think, you know, you'd be very, very pleased.

MR. MEL WEINBERG: That's all. I mean, you know, I'm going to meet with you.

MR. BARRY KLAYMINC: Right. Yeah, I'd like to meet you also.

MR. MEL WEINBERG: Oh, yeah, yeah. I thought Pop was bringing you up the last time.

MR. BARRY KLAYMINC: What?

[15] MR. MEL WEINBERG: Pop was supposed to be bringing you up the last time.

MR. BARRY KLAYMINC: Oh, was he? I don't know. He didn't mention to me.

MR. MEL WEINBERG: Yeah, I told him to bring you up. Listen—

MR. BARRY KLAYMINC: All right.

MR. MEL WEINBERG: —I'd like to meet you. But I mean, what I'm worried about is that anything happens to Pop, you know what to do, where to order, get the stuff, and—

MR. BARRY KLAYMINC: Right. Oh, no, no, I mean, you know, God forbid, of course, if that would ever happen, I mean, I'd fill right in, and I mean, I'd jump right in. I mean, I'm—you know, you're not talking to a greenhorn here.

MR. MEL WEINBERG: All right, you know, I mean, the main thing [17] is that you know how to make the L's, that you did before.

MR. BARRY KLAYMINC: Yeah, definitely, definitely.

MR. MEL WEINBERG: So I mean you definitely made 'em before, then.

MR. BARRY KLAYMINC: Oh, yeah. Well, you know, I was involved with it, so I mean, I knew the whole operation, you know. It's not—you know, in the regular business we were in, the other leather bags, which were probably even more complicated 'cause we dealt with so many more styles and variations and everything else—

MR. MEL WEINBERG: I'm more interested in the L.V.'s.

MR. BARRY KLAYMINC: Yeah, I understand that, but I'm just saying, if that came fairly easy to me, all the other stuff, this stuff is a breeze. It really is, you know. I mean—

[18] MR. MEL WEINBERG: Well, what I mean is did you ever do this before? That's what I'm trying to find out.

MR. BARRY KLAYMINC: What do you mean, did we ever do it?

MR. MEL WEINBERG: I know Pop did the L.V.'s.

MR. BARRY KLAYMINC: Oh, yeah, well, you know, I've been with him for a while. I mean—

MR. MEL WEINBERG: Yeah, so you know the whole operation.

MR. BARRY KLAYMINC: Oh, yeah, sure, sure.

MR. MEL WEINBERG: That's what I was trying to find out.

MR. BARRY KLAYMINC: Oh, yeah, from the initial laying up of fabric to the final packing of the merchandise.

MR. MEL WEINBERG: In fact, I spoke to your mother and she was telling me how she sold them.

[19] MR. BARRY KLAYMINC: Yeah.

MR. MEL WEINBERG: I was surprised.

MR. BARRY KLAYMINC: Well, she was doing a nice job. Of course, you know, we ran into a little trouble . . .

MR. MEL WEINBERG: Aaah, the hell with it. You know how to sell 'em too, then?

MR. BARRY KLAYMINC: Oh, yeah.

MR. MEL WEINBERG: Hah?

MR. BARRY KLAYMINC: Yup.

MR. MEL WEINBERG: What, you were selling them too?

MR. BARRY KLAYMINC: Everything. Like I told you, from "A" to "Z" I was involved, you know. It's—you know, and then I would run out like in the afternoons and go out selling. Of course when I was selling, [20] I was, you know, basically selling our, you know, regular merchandise out of the showroom, you know. But oh, yeah, I was involved. I'm familiar, you know. All I have to do is tell you I'm familiar with the entire process, and you know, it's my feeling, of course, my father has a number of good years left in him anyway. I mean, I don't want to think anything otherwise (put

it that way), because I know if my father ever, you know, retired, he'd go nuts, you know. And that's how he would get sick. You know, he has to be busy with something at least three, four days a week, if you know what I'm saying.

MR. MEL WEINBERG: Right.

MR. BARRY KLAYMINC: And you know, of course, you know, God forbid if anything should happen, of course, you know, I'm there and, you know, I'm going to be there. But I don't want to even look at any other possibilities. I know my father's, you know, going [21] to be—he really wants to work a good, you know, another four or five years to, you know, give good, good work, and then maybe, you know, he'll really, like, semi-retire or . . .

MR. MEL WEINBERG: You got a middle initial, Barry?

MR. BARRY KLAYMINC: Yeah, D.

MR. MEL WEINBERG: What's that stand for?

MR. BARRY KLAYMINC: Dean.

MR. MEL WEINBERG: Oh, Dean?

MR. BARRY KLAYMINC: Yeah.

MR. MEL WEINBERG: Barry Dean. That's a good name.

MR. BARRY KLAYMINC: Yeah. Yeah.

MR. MEL WEINBERG: How do you spell your last name?

[22] MR. BARRY KLAYMINC: K-L—

MR. MEL WEINBERG: K-L—

MR. BARRY KLAYMINC: —A-Y—

MR. MEL WEINBERG: —A-Y—

MR. BARRY KLAYMINC: —M-I-N-C. You know the whole—you know the address and everything, and—okay, and he also mentioned to me that, you know, when we want to make that pickup that I'll go along with your men or whatever, you know, with the—

MR. MEL WEINBERG: Oh, yeah, that's what I want to go over with you. All right.

MR. BARRY KLAYMINC: Yeah, no problem with that.

MR. MEL WEINBERG: All right, well, we're letting George make the pickup, all right?

[23] MR. BARRY KLAYMINC: Right.

MR. MEL WEINBERG: He know I would go with you. I'll send one of my drivers with the cash.

MR. BARRY KLAYMINC: Okay, no problem.

MR. MEL WEINBERG: Well, probably it's for your protection too.

MR. BARRY KLAYMINC: Right.

MR. MEL WEINBERG: All right? And then they'll take it and they'll go right to the plane. We'll have a plane at the airport.

MR. BARRY KLAYMINC: Fine. No problem.

MR. MEL WEINBERG: All right? We got to go to Jersey.

MR. BARRY KLAYMINC: Yeah, yeah, he's out in Jersey. I don't have his address here. I'll get that from my father.

[24] MR. MEL WEINBERG: Oh. I mean, is the place a safe place, though?

MR. BARRY KLAYMINC: What's that?

MR. MEL WEINBERG: Well, where they're going, is it a safe place with the house or factory, or what?

MR. BARRY KLAYMINC: I'm pretty sure, you know, it's a factory, but as far as I know, it's safe. I mean, there's never been any screw-ups before, so—

MR. MEL WEINBERG: All right—

MR. BARRY KLAYMINC: —you know—

MR. MEL WEINBERG: —that's all. I don't want to get you involved with it, you know.

MR. BARRY KLAYMINC: No, there won't be any trouble. I mean, you know, this guy's, you know, a good man, and you know, there really won't be any problem.

[25] MR. MEL WEINBERG: My driver will be up there. I told your father it'll be May 2nd.

MR. BARRY KLAYMINC: For May 2nd, right, yeah. That he mentioned to me, so that's like about three weeks, let's say? All right, so, you know, we'll plan on it for that, then, but in the meantime, which is important also, of course, you know, to get this stuff—and he mentioned to me that you had, you know—there was, like, a guy coming in that was doing some of the buying of the machinery and stuff, you know—

MR. MEL WEINBERG: Yeah, but I told him not to say nothin', you know.

MR. BARRY KLAYMINC: Well, you know, to me, I mean, it's—no, no, I'm talking about my father.

MR. MEL WEINBERG: Yeah, I told him not to tell anyone this, because we—

[26] MR. BARRY KLAYMINC: No, no, he didn't really tell—he just said, "Look, he's taking care of it," 'cause you know, I was concerned 'cause you had these guys like all over the place.

MR. MEL WEINBERG: That's all right. Let 'em go all over.

MR. BARRY KLAYMINC: What?

MR. MEL WEINBERG: Let 'em go all over.

MR. BARRY KLAYMINC: All right, but if—you know, I was getting a little annoyed, but if I know it's your guys, I don't say anything. I mean, it's fine. Larry takes care of it with the—

MR. MEL WEINBERG: It's got to look legit.

MR. BARRY KLAYMINC: What?

MR. MEL WEINBERG: It's got to look legit, you know, that—

[27] MR. BARRY KLAYMINC: Okay, but Mel, let me tell you, at least when my father mentioned to me that, you know, these guys are, you know, most likely your guys there, it made me feel a heck of a lot better. I mean, this was, you know—

MR. MEL WEINBERG: Oh. You know, technically you can't stop 'em.

MR. BARRY KLAYMINC: What?

MR. MEL WEINBERG: Technically you can't stop 'em.

MR. BARRY KLAYMINC: What do you mean, you can't stop 'em?

MR. MEL WEINBERG: Well, if C.I.T. wants to take the machines out, they can take 'em.

MR. BARRY KLAYMINC: Of course they can take 'em. What are they going to? They know they're going to be worthless unless they let, you know—our man, unless they let this guy basically liquidate the stuff. You know, what is it? They have knowledge of [28] who to sell the machinery to and stuff? You know, the smartest thing is for them to do it this way. But as long as I know, you know, I mean, I got a little annoyed—you know, I went in and I had a few personal items, you know, like in my desk, you know, to still clean out and I got these guys rummaging around, like, in my belongings and stuff.

MR. MEL WEINBERG: You know, they got to make it look good.

MR. BARRY KLAYMINC: Yeah, as long as—look, that made me a lot more pleased that I know that, you know, at least I know, you know, that, you know—what's happening 'cause, you know—whatever, you know, is going out there, you know. So—

MR. MEL WEINBERG: Yeah, no, we had to make it look good.

MR. BARRY KLAYMINC: All right, fine, as long as I'm—I'm glad—

MR. MEL WEINBERG: All those machines we put and shipping right out.

[29] MR. BARRY KLAYMINC: Good. Okay, that's important, because, you know, you went over it with my father, I guess, you know, like what you really felt, you know, he needed, so you know, that's important. All right.

MR. MEL WEINBERG: And there's no problem whatsoever.

MR. BARRY KLAYMINC: Okay. Good.

MR. MEL WEINBERG: Okay?

MR. BARRY KLAYMINC: Very good.

MR. MEL WEINBERG: It's good speaking to you.

MR. BARRY KLAYMINC: Very good speaking to you, and have a very good stay out there, and I hope to meet you when you get back.

MR. MEL WEINBERG: Oh, I definitely will next time I'm in New York. We'll get together.

REBOUL, MACMURRAY, HEWITT,
MAYNARD & KRISTOL
45 Rockefeller Plaza
New York, N.Y. 10111

April 13, 1983

John Kildebeck, Esq.
Head Deputy District Attorney
Complaint Section
210 West Temple Street
Los Angeles, California 90012

*U.S.A. ex rel. Vuitton et Fils S.A.
v. Karen Handbag, et al.*

Dear John:

I am writing to confirm our telephone conversation on April 12, 1983, regarding the above-entitled federal proceeding. I informed you that I have been specially appointed by United States District Judge Charles L. Brieant to represent the United States in connection with the investigation and prosecution of a number of individuals who, in conspiracy one with the other, are willfully violating a permanent injunction prohibiting them from dealing in counterfeit Louis Vuitton merchandise. (A copy of that order is enclosed. The original is being kept under seal, so I therefore ask that you treat it confidentially.)

I called you at the suggestion of Assistant United States Attorney William J. Landers to discuss with you the possible application of West's Ann. Penal Code §§ 632 and 633 to the videotaping and tape recording by federal undercover agents in a hotel room in Los Angeles in connection with the aforesaid investigation. You confirmed what Bill Landers told me, namely that it was no problem.

Nonetheless, since the activities in Los Angeles of some of the persons under federal investigation would appear to violate West's Ann. Penal Code §§ 181, 351, 484 and

542, among others, to remove any question as to the possible application of Penal Code § 632 to the activities of my undercover agents, you requested that so much of the federal investigation as is being conducted in Los Angeles be made at your direction. I agreed to that.

After the federal investigation is completed, I will discuss with you whether the interests of justice indicate that the evidence obtained in Los Angeles, if any, should be used in support of a federal or state proceeding.

I would appreciate your confirming the foregoing by signing a copy of this letter in the place provided and returning it to my waiting messenger.

Finally, on a personal note, many thanks for all the cooperation on such short notice.

Very truly yours,

J. JOSEPH BAINTON

mb

BY HAND

CONFIRMED:

/s/ John Kildebeck 4/14/83
JOHN KILDEBECK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

TRANSCRIPT OF VIDEO TAPE

TAPE 2

4-14-83, 9:31 A.M. to 10:20 A.M.

Sol Klaymine and Gerald J. Young

* * * * *

[32] MR. SOL KLAYMINC: He's paranoid about it.

MR. GERALD YOUNG: I got set up, Mel, in one of the sweetest scams there ever was from a guy I knew for eleven years. Say Sol—I know Sol eleven years. He introduced me to a guy like you who he has known for five years.

MR. MEL WEINBERG: Yeah.

MR. GERALD YOUNG: Okay? And I was selling him some merchandise. Not in this program, another business. Shows me an attache case full of el greeno; we drive down to the warehouse, the back of the deuce- and a half truck is loaded with marshals.

MR. MEL WEINBERG: Ah yeah, but that's a different type. Let me explain something to you, all right. You're a smart guy, and you've been around. All right?

[33] MR. GERALD YOUNG: Couple of years.

MR. MEL WEINBERG: Okay. Number one, you're not doing a federal rap.

MR. GERALD YOUNG: That is correct.

MR. MEL WEINBERG: Okay, number two, you're doing—

MR. GERALD YOUNG: Civil crimes.

MR. MEL WEINBERG: Civil crime. No one is going to lay out the bread that we're laying out for a civil crime to get you. You're not that important, Jerry.

MR. GERALD YOUNG: I agree. I agree.

MR. MEL WEINBERG: Okay. You're not that important, all right? Let's call a spade a spade.

* * * * *

[40] MR. GERALD YOUNG: Mel, where is this merchandise going to wind up?

MR. MEL WEINBERG: The stuff, after he finishes?

MR. GERALD YOUNG: Yeah.

MR. MEL WEINBERG: You mean the finished product?

MR. GERALD YOUNG: Yeah.

[41] MR. MEL WEINBERG: Europe.

MR. GERALD YOUNG: In Europe?

MR. MEL WEINBERG: Yeah.

MR. GERALD YOUNG: Ah—do you have chains of stores in Europe to move the merchandise?

MR. MEL WEINBERG: Let me explain to you our operation.

MR. GERALD YOUNG: Are they ladies or mens or both?

MR. MEL WEINBERG: Both. Let me explain our operation. You apparently are a high roller so you know Vegas. All right. In Vegas, when you have a casino a hotel, you sell the concessions.

[42] MR. GERALD YOUNG: Right.

MR. MEL WEINBERG: In Europe, they don't sell the concessions; we own them, all right? And we make—out of certain countries that we're in, we got to put so much money into the country, all right? So, we have quite a few stores we can put out.

MR. SOL KLAYMINC: It gets sold.

MR. MEL WEINBERG: All right. Now—

MR. GERALD YOUNG: What else can you use for these stores?

MR. MEL WEINBERG: We can use any type of men's stuff.

MR. GERALD YOUNG: Mens?

[43] MR. MEL WEINBERG: Mens, womens. I'm not in the garment business. I don't know a fuckin' thing about it, all right? I found—I'm learning—I'm getting educated in this business. I wouldn't buy anything in a fuckin' department store. I told my wife if she goes out and spends any fuckin' money on a fuckin' [INAUDIBLE]—

MR. GERALD YOUNG: Do you live in Florida?

MR. MEL WEINBERG: I live in Florida. Well—

MR. SOL KLAYMINC: Not far from me.

MR. MEL WEINBERG: Well—I travel most of the time. You got something on your mind, spit it out.

MR. GERALD YOUNG: I just want to know one thing. Is West your original name?

* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

TRANSCRIPT OF VIDEO TAPE

TAPE 4

4-14-83, 4:34 P.M. to 6:27 P.M.

SOL KLAYMINC
DAVE ROCHMAN

* * * * *

[155] MR. DAVE ROCHMAN: See, that's American Airlines' hub, Dallas, Fort Worth/Dallas airport?

MR. MEL WEINBERG: But we're not goin'—we're goin' Delta.

MR. GUNNAR ASKELUND: Well, they stop there, too.

MR. DAVE ROCHMAN: Oh?

MR. MEL WEINBERG: We don't get back to West Palm until like 11:00 o'clock.

MR. GUNNAR ASKELUND: You lose three hours going back.

MR. SOL KLAYMINC: You want to stay with him?

MR. MEL WEINBERG: Yeah. I got a few things—

MR. SOL KLAYMINC: Could I interest you uh—could I? You don't mind?

[156] MR. MEL WEINBERG: No. Go ahead.

MR. SOL KLAYMINC: On the eel stuff—I'm in an area where my wife could handle that. She handles stuff like that. She sells regular goods, you know.

MR. DAVE ROCHMAN: No problem.

MR. SOL KLAYMINC: Would you care if uh—

MR. DAVE ROCHMAN: No problem.

MR. SOL KLAYMINC: —if you send her—

MR. DAVE ROCHMAN: No problem at all.

MR. SOL KLAYMINC: Should I call you or do you just want to send her—

MR. DAVE ROCHMAN: I'll give all the information to Mel.

[157] MR. SOL KLAYMINC: Okay. This would be a good way to keep her busy, get her out of my hair.

MR. MEL WEINBERG: You mean she's going to stop selling the LVs and now go sell the eels?

MR. SOL KLAYMINC: Well, that's—she's a little scared of, you know, but, uh eel or Fendi, she's not afraid of.

MR. GUNNAR ASKELUND: How you going to stop this stuff from—selling like hotcakes in Florida, right?

MR. DAVE ROCHMAN: It is.

MR. SOL KLAYMINC: You see, in Florida you got the people for that.

MR. GUNNAR ASKELUND: There's a lot'a money down there.

MR. SOL KLAYMINC: You got the country club people. They buy three, four dozen.

[158] MR. MEL WEINBERG: He lives in a high class section.

MR. DAVE ROCHMAN: One of the classiest boutique stores—which was, by the way, just written up, in one of the boutique magazine—*Vogue* or something like that in Chicago, Francis Hepperman's—flew in to see me on this stuff. She was in last week with her sister. So, I mean, you know, this stuff here, your talking—it's a class act, and you can go into the finest stores in the, in the country, in the world. I had somebody from Calgary, Canada who's on vacation down in, in Scottsdale, Arizona—I don't know what the guy does, and I didn't ask him—but, evidently, he's got a lot of money. He must be—I think he said oil or something like that up in Calgary, and this guy wants to strike a deal and, handle, you know, the whole country.

MR. SOL KLAYMINC: He's in oil and he wants to do this?

[159] MR. DAVE ROCHMAN: Yeah. His wife must have left about three grand with us.

MR. SOL KLAYMINC: Well, I have a sales organization, which I could get back, you know on that eel stuff—I could set it up.

MR. DAVE ROCHMAN: Put some feelers out. You're going to find that eel is the hottest thing in the country today. It's the hottest thing in the world.

MR. SOL KLAYMINC: We can develop that together.

MR. MEL WEINBERG: Okay.

MR. SOL KLAYMINC: Sell this around the country.

MR. MEL WEINBERG: I can see you when you get down to Haiti, having little blacks goin' out and collectin' eels for you.

[160] MR. SOL KLAYMINC: Yeah.

MR. DAVE ROCHMAN: I only got one question I want to ask?

MR. SOL KLAYMINC: Yeah.

MR. DAVE ROCHMAN: You can find the people in Haiti that can produce, that actually can stitch and cut and—

MR. SOL KLAYMINC: Well, I'll do the cutting, right now, at home.

MR. DAVE ROCHMAN: But I mean, you're going to be able to to the cutting in Haiti? With the uh—

MR. SOL KLAYMINC: Yeah.

MR. DAVE ROCHMAN: With the work force you got there?

MR. SOL KLAYMINC: No, my son does the cutting.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

TRANSCRIPT OF TELEPHONE CALL
MR. SOL KLAYMINC CALLS MR. MEL WEINBERG
AT 747-2485

TAPE #42

4/17/83, 10:40 P.M.

* * * *

[7] MR. SOL KLAYMINC: Yeah, and how, yeah, incidentally, how did you make out with that guy finally?

MR. MEL WEINBERG: We're buying the place.

MR. SOL KLAYMINC: Which place?

MR. MEL WEINBERG: The plant that makes the material.

MR. SOL KLAYMINC: Yeah?

MR. MEL WEINBERG: Yeah.

MR. SOL KLAYMINC: It's dangerous though, you know that.

MR. MEL WEINBERG: Why?

MR. SOL KLAYMINC: Well, you never know, if somebody puts a rat on, the plant is worth nothing.

MR. MEL WEINBERG: Well, we're not going to use it for nothing else, how could someone, we're going to put [8] our own people in there.

MR. SOL KLAYMINC: I know that, but you never know when somebody follows a source down.

MR. MEL WEINBERG: Yeah, but the sources are all going to be going to you and George.

MR. SOL KLAYMINC: Yeah, but, in other words, is there a chance that somebody can rat whatever's being made.

MR. MEL WEINBERG: No, because we're not selling it to nobody.

MR. SOL KLAYMINC: Okay, all right.

MR. MEL WEINBERG: It's only gonna, look, there's only gonna be two places and then we're going to buy another place that make it our own places.

MR. SOL KLAYMINC: Uh huh. My son was mentioning that you wanted him to, that you might buy a factory to make the goods in New York or some... [9] MR. MEL WEINBERG: Right, and we're going to put him in there.

MR. SOL KLAYMINC: No, he wouldn't do it, and I told him I wouldn't want him to do it. Mel, my advice, you cannot manufacture that stuff on any large scale, not in the states.

MR. MEL WEINBERG: No, what I want him to do...

MR. SOL KLAYMINC: Yeah?

MR. MEL WEINBERG: Okay, is to cut the material to ship to you.

MR. SOL KLAYMINC: Well that's something else.

MR. MEL WEINBERG: Okay?

MR. SOL KLAYMINC: He didn't understand that.

MR. MEL WEINBERG: No, well...

MR. SOL KLAYMINC: Not to produce it?

[10] MR. MEL WEINBERG: No no, we're just going to cut the material at the other plant, all right?

MR. SOL KLAYMINC: Right.

MR. MEL WEINBERG: And then send it down to you.

MR. SOL KLAYMINC: Uh huh.

MR. MEL WEINBERG: So all you gotta do is the sewin'.

MR. SOL KLAYMINC: Yeah.

MR. MEL WEINBERG: You follow me?

MR. SOL KLAYMINC: And you put it all together.

MR. MEL WEINBERG: Right.

MR. SOL KLAYMINC: Yeah.

MR. MEL WEINBERG: That's what we intend to do.
[11] MR. SOL N. KLAYMINC: Okay, that makes a little more sense.

MR. MEL WEINBERG: But, we'll have, we'll own the rollers and everything.

MR. SOL N. KLAYMINC: All right, but like I say, as long as you don't look to sell the material outside. . .

MR. MEL WEINBERG: No, no, no.

MR. SOL N. KLAYMINC: Because then you're exposing yourself too much.

MR. MEL WEINBERG: No, no way are we going to sell on the out.

MR. SOL N. KLAYMINC: All right.

MR. MEL WEINBERG: This is strictly for our own use.

MR. SOL N. KLAYMINC: Okay, then it makes sense. So, in other words, you can work out something with that guy?

MR. MEL WEINBERG: Yeah.

MR. SOL N. KLAYMINC: Are you going to buy his finished goods too?
* * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

AFFIDAVIT

STATE OF NEW YORK)
)
) ss:
COUNTY OF NEW YORK)

J. JOSEPH BAINTON, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and pursuant to order dated March 31, 1983, was specially appointed to represent the Government in connection with the investigation and prosecution of acts constituting criminal contempt of this Court's Final Consent Judgment and Permanent Injunction filed July 30, 1982 (the "injunction"). I make this affidavit in support of the Government's application for the issuance of the annexed order directing the above alleged criminal contemnors to show cause why they should not be convicted of criminal contempt of the injunction.

2. Pursuant to the aforesaid order, commencing in the late afternoon of March 31, 1983, an intensive undercover investigation as described in my March 30, 1983 affidavit was undertaken by the Government. That investigation has yielded in excess of 70 tape recordings and a number of videotapes. The three persons who have served as Government undercover agents are Gunnar Askeland, who for a period in excess of ten years served with the Federal Bureau of Investigation, Melvin Weinberg, who on numerous prior occasions has acted as a

undercover agent on behalf of the Government, and Michael Harvey, a sergeant in the San Fernando Police Department. In addition, representatives of the office of the United States Attorney for the Central District of California, the office of the District Attorney of Los Angeles, and members of the Federal Bureau of Investigation have also been of assistance.

3. I hereby represent to the Court that the Government has amassed overwhelming evidence to support each of the very precisely defined charges contained in the order to show cause. Accordingly pursuant to 28 U.S.C. § 401(3) and Rule 42(b) of the Federal Rules of Criminal Procedure I hereby request that the Court sign the annexed order to show cause, thus placing the alleged criminal contemnors on notice of the charges of criminal contempt.

4. Also being submitted herewith are warrants for the arrest of each of the contemnors. As the Court is aware, alleged contemnor Sol. N. Klaymine has recently been convicted of criminal contempt. Both he and his son, alleged criminal contemnor Barry Dean Klaymine, have a manufacturing plant in Haiti. Sol N. Klaymine has stated during the course of the investigation that he does not mind living in Haiti. Accordingly, there is ample ground to believe that unless an appropriate bail is fixed neither he nor his son will appear for the trial of this action.

5. Defendant Gerald J. Young during the course of the investigation has revealed that he deals in cash transactions approaching and on occasion exceeding seven figures. As is a matter of public record, if convicted in this proceeding, by reason of collateral estoppel pursuant to the terms of a final consent judgment entered in an action in the Central District of California to which Mr. Young and Vuitton et Fils S.A. were parties, Mr. Young will be obliged to pay to Vuitton the sum of \$750,000. Accordingly, there is ample reason to believe that unless an appropriate bail is fixed Mr. Young will not appear at

the trial of this action. Indeed, at the moment Government undercover agents have been informed that Mr. Young is "very hinky" and has "gone underground".

6. Defendants David Rochman and Robert G. Pariseault have undertaken to sell to Government undercover agents for \$550,000 paraphernalia used to manufacture counterfeit Louis Vuitton fabric and, in addition, have agreed to sell to Government undercover agents thousands of counterfeit Vuitton goods. Mr. Pariseault, a Rhode Island attorney, I am informed in the past has represented individuals believed to be associated with Organized Crime. In addition, during the course of the investigation Messrs. Rochman and Pariseault have recounted the great steps that they have taken to avoid detection. Accordingly, there is reason to believe that unless an appropriate bail is fixed they will not appeal for the trial of this action.

7. During the course of the investigation, alleged contemnor George Cariste claimed to be affiliated with known members of Organized Crime including "Matty the Horse". He is presently reported to "have gone underground". Thus, there is sufficient reason to believe that unless an appropriate bail is fixed he will not appeal for the trial of this action.

8. Alleged contemnor Nathan Helfand, who as described in my March 30 affidavit is the "middleman" through whom Government undercover agents met all of the other alleged contemnors, I understand is a person with few roots in the community and thus is unlikely to appear at trial unless an appropriate bail is set.

9. Accordingly, it is appropriate and necessary that these individuals be arrested rather than summoned to appear before the Court. Assuming the Court signs the warrants being submitted herewith, these arrests will be made by special agents of the Federal Bureau of Investigation. The Bureau's participation in this proceeding I am informed has already been approved in Washington.

10. These arrest will all be attempted to be made at noon on May 2, 1983, when various meetings and "pay-offs" have been scheduled at various locations by Government undercover agents. The Government is seeking these warrants at this time in order to co-ordinate the various arrests among several offices of the Federal Bureau of Investigation. Until the arrests are made, the Government undercover operation will continue and further evidence of guilt will likely be obtained during the next six days. Such conduct by the Government under these circumstances is in all respects proper. *United States v. Watson*, 423 U.S. 411, 431 (1976) (Powell, J. concurring); *Koran v. United States*, 469 * * *, 1071 (5th Cir. 1972); *United States v. Joines*, 258 F.2d 471 * * * Cir.) cert. denied, 358 U.S. 880 (1958).

/s/ J. Joseph Bainton
J. JOSEPH BAITON

[Affidavit Omitted in Printing]

J. JOSEPH BAINTON
45 Rockefeller Plaza
New York, N.Y. 10020
212 841-5700

May 7, 1984

Lorin Duckman, Esq.
100 Church Street
Suite 1968
New York, New York 10007

Re: United States of America, *ex rel.*
Vuitton et Fils S.A. v. Karen Bags,
Inc. et al., 83 CR Misc. 1, pg. 22 (CLB)

Dear Mr. Duckman:

The following constitutes the entire terms of the agreement between Specially Appointed Attorney for the United States of America J. Joseph Bainton (the "Government") and your client, David Rochman ("Rochman").

1. On or before May 15, 1984, Rochman will plead guilty before a United States Magistrate to a petty offense of violating Title 18, United States Code, Section 401, on charges of criminal contempt arising from Rochman's role in aiding and abetting Sol Klayminc and others willfully violate an order of the United States District Court for the Southern District of New York prohibiting the counterfeiting of the products bearing the registered trademark of Louis Vuitton S.A. ("Vuitton").

2. Rochman will voluntarily be deposed by the Government with respect to his knowledge of, and participation in, the acts leading to the charges initiated by the order to show cause issued by United States District Judge Charles L. Brieant on April 29, 1983, charging criminal contempt violations. Furthermore, Rochman agrees to produce for the Government any and all docu-

mentary material and other evidence requested by it in connection with this matter.

3. Rochman will voluntarily testify as a witness in the trial, now scheduled to commence on May 14, 1984, and at any other hearings and trials resulting from the order to show cause dated April 29, 1983. Further, Rochman agrees to testify completely, candidly and truthfully with respect to all matters about which he is questioned during the course of the trials and hearings, if any.

4. Both parties agree to request that Rochman's sentencing be held in abeyance until the completion of any trials stemming from the order to show cause.

5. In exchange for his cooperation, the Government agrees to provide the sentencing court orally and in writing with a statement describing the full extent of Rochman's cooperation with the Government. Furthermore, if at the completion of all of his testimony, the Government is satisfied that Rochman has testified truthfully and completely about the facts of the case, it will recommend to the sentencing court that the court impose on Rochman a probationary sentence. It being understood that such recommendation will not be binding on the sentencing court.

6. If it is determined at any time by the Government that Rochman has not been fully and completely truthful in his statements and testimony, the Government will be free to prosecute Rochman for any and all violations by him of Title 18, United States Code, Section 401 stemming from trademark infringements regarding the products of Louis Vuitton. Further, the Government will be free to use against Rochman any statements or testimony which he has given. Additionally, if it is determined that Rochman has deliberately lied or been untruthful in his testimony, Specially Appointed Attorney for the United States of America J. Joseph Bainton will be free to refer Rochman's testimony for possible prosecution to the United States Attorney's Office for the Southern District of New York.

7. It is understood and agreed by and between the parties that this agreement is binding on the Government with respect to the charges against Rochman initiated by the order to show cause dated April 29, 1983 and any other known or unknown Vuitton trademark violation.

Very truly yours,

/s/ J. Joseph Bainton
J. JOSEPH BAINTON
Specially Appointed Attorney
for the United States of America

If the above accurately reflects the entire terms of the agreement between the parties, please so indicate by signing and having your client sign below.

/s/ Lorin Duckman
LORIN DUCKMAN

/s/ David Rochman
DAVID ROCHMAN

REBOUL, MACMURRAY, HEWITT,
MAYNARD & KRISTOL
45 Rockefeller Plaza
New York, N.Y. 10111

May 7, 1984

Lorin Duckman, Esq.
100 Church Street
Suite 1968
New York, N.Y. 10007

Louis Vuitton S.A., et al. v.
Host National Corporation, et al.
83 Civ. 4376 (CLB)

Dear Mr. Duckman:

I am writing to confirm our discussions regarding disposition of the claims asserted in the above-entitled action against your client David Rochman, his wife, Karen Rochman, his brother and sister-in-law, Donald and Sharon DeCastle, and their company Host National Corporation.

In connection with discussions regarding the disposition of certain criminal charges against Mr. Rochman in the related criminal contempt proceeding entitled *United States of America, ex rel., Vuitton et Fils S.A., and Louis Vuitton S.A. v. Karen Bags, Inc., Sol N. Klayminc, et al.*, you disclosed that Mr. Rochman had recently gone through personal bankruptcy and was desirous of putting all aspects of this matter behind him. Mr. Rochman also indicated that neither other members of his family nor Host, as a practical matter, are in a position to satisfy any judgment which might be rendered against them in that matter.

Accordingly, in connection with a plea agreement as is reflected in the letter between you and me bearing the same date as this letter, on behalf of our clients Louis Vuitton S.A., Gucci Shops, Inc. and Fendi Paola N Sorelle

SAS Company, I agreed to dismiss with prejudice all claims asserted in the above-entitled action against the individuals above-named if Mr. Rochman complies in all respects with the terms of the above-mentioned plea agreement.

Very truly yours,

/s/ J. Joseph Bainton
J. JOSEPH BAINTON

JJB:Di

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 83-01314-BKC-TCB

IN RE SOL KLAYMINC and SYLVIA KLAYMINC, DEBTORS.

Adversary Case No.

VUITTON ET FILS S.A., PLAINTIFF,

vs.

SOL KLAYMINC and SYLVIA KLAYMINC, DEFENDANTS.

**COMPLAINT TO DETERMINE DISCHARGEABILITY
OF DEBTS AND OBJECTIONS TO
DISCHARGE OF DEFENDANTS**

Plaintiff Vuitton et Fils S.A. ("Vuitton"), by its attorneys, Reboul, MacMurray, Hewitt, Maynard & Kristol, for its Complaint to Determine Dischargeability of Debts and Objections to Discharge of defendants Sol Klayminc and Sylvia Klayminc ("defendants"), alleges:

Jurisdiction

1. This Court has jurisdiction of this proceeding pursuant to 28 U.S.C. § 1471, 11 U.S.C. §§ 523 and 727.

The Parties

2. Upon information and belief, on or about July 18, 1983, defendants filed a joint petition pursuant to Chap-

ter 7 of the Bankruptcy Code, 11 U.S.C. § 701 *et seq.* Defendants are the debtors in this Chapter 7 proceeding and have sought a discharge of their debts pursuant to 11 U.S.C. § 727.

3. Vuitton is a creditor of defendants.

Background of the Action

4. This adversary proceeding is brought to object to the discharge of defendants on the grounds that defendants should be barred from a discharge of their debts pursuant to U.S.C. §§ 523 and 727.

5. Upon information and belief, for more than five years, defendants have been engaged in an unlawful conspiracy to manufacture and sell hundreds of thousands of dollars worth of counterfeit Vuitton merchandise in violation of the federal laws prohibiting trademark infringement, 15 U.S.C. §§ 1114 and 1125, federal and state laws prohibiting unfair competition, other civil and criminal statutes and laws, and various outstanding injunctions against them issued by the United States District Court for the Southern District of New York.

6. Pursuant to their unlawful scheme, defendants, directly and through their co-conspirators, mass-manufactured counterfeit Vuitton merchandise, and sold, and conspired to sell, that counterfeit merchandise to consumers on a nationwide basis.

7. In December, 1978, Vuitton commenced an action against Sol N. Klaymine, and others, in the United States District Court for the Southern District of New York for trademark infringement and other violations of Vuitton's rights. Sylvia Klaymine was thereafter added as a defendant in the case.

8. On December 12, 1978, defendant Sol N. Klaymine, among others, consented to a preliminary injunction entered by the United States District Court for the Southern District of New York, enjoining him, and all those acting in concert or participation with him, from manufacturing or selling counterfeit Vuitton merchandise.

9. In violation of the foregoing injunction, defendants continued their unlawful manufacture and sale of counterfeit Vuitton goods. As a result, on May 20, 1982, after a three day trial in the Southern District of New York, Sol N. Klayminc was found guilty of criminal contempt, and placed on probation for a period of one year.

10. On July 13, 1982, in settlement of the litigation in the Southern District of New York, defendants executed and delivered to Vuitton Affidavits of Confession of Judgment confessing judgment against them in the amount of \$100,000 for their unlawful activities, and defendants also executed and delivered to Vuitton a Deferred Payment and Security Agreement, dated July 13, 1982, by which they agreed, among other things, to pay to Vuitton \$100,000, plus interest, in satisfaction of Vuitton's judgment against them for damages resulting from their tortious, willful and malicious conduct.

11. Defendants have failed to comply with the terms of that Agreement, as described below, and, as a result, are presently indebted and in default to Vuitton under the terms of the agreement in the amount of \$79,757.36, plus interest, as well as for the costs and attorneys' fees arising out of this action.

12. On July 22, 1982, defendants entered into a Final Consent Judgment and Permanent Injunction by which they were enjoined by the United States District Court for the Southern District of New York from, *inter alia*, engaging in the manufacture and sale of counterfeit Vuitton merchandise.

13. Upon information and belief, despite the outstanding permanent injunction issued in July, 1982, defendants continued to manufacture and sell counterfeit Vuitton merchandise and to realize substantial profits from their unlawful operations. As a result, defendant Sol N. Klayminc is now a defendant in further criminal and civil contempt proceedings in the United States District Court for the Southern District of New York.

14. Upon information and belief, defendants' principal source of income over at least the past five years has been the unlawful manufacture and sale of counterfeit merchandise. Upon information and belief, in the past five years alone, defendants have reaped hundreds of thousands of dollars of profits through their unlawful manufacture and sale of counterfeit Vuitton goods. Upon information and belief, defendant Sol N. Klaymine acknowledged these extensive counterfeiting activities and illegal profits in March or April of 1983 while being video or audio taped as part of an undercover investigation authorized by the United States District Court for the Southern District of New York.

15. Having reaped profits in the hundreds of thousands of dollars from their unlawful activities, and having incurred more than \$1,513,671 of debts to their creditors, defendants now claim to have only \$76,875 of assets (virtually all of which they claim to be exempt) and they seek to avoid payment of their debts by means of this Chapter 7 proceeding. Defendants' efforts to obtain a discharge of their obligations should be denied on each of the grounds set forth below.

FIRST OBJECTION TO DISCHARGE

16. By their unlawful scheme to manufacture and sell counterfeit Vuitton merchandise, defendants have tortiously, maliciously and willfully injured Vuitton and its property. Defendants directly, and through their agents and co-conspirators, have, among other things, (a) obtained hundreds of thousands of dollars in illegal profits in violation of Vuitton's rights, (b) diverted hundreds of thousands of dollars of sales from Vuitton, and (c) violated and caused injury to the Vuitton name, trademark, and reputation.

17. Defendants are liable to Vuitton in an amount exceeding \$200,000 for their unlawful activities, as set forth above, and are further liable to Vuitton pursuant

to the July 13, 1982 Deferred Payment and Security Agreement in the amount of \$79,757.36 plus interest, as well as for the costs and attorneys' fees of this proceeding.

18. The foregoing liabilities are nondischargeable debts under 11 U.S.C. § 523(6).

SECOND OBJECTION TO DISCHARGE

19. Pursuant to the terms of the July 13, 1982 Deferred Payment and Security Agreement, defendants undertook and agreed to pay Vuitton \$100,000, plus interest, in settlement of pending litigation by Vuitton against defendants. Defendants pledged various assets to Vuitton as security for the foregoing debt, and represented that they would execute further documents to effect the transfer, pledge and assignment of various assets and the perfection of such security interests.

20. In order to induce Vuitton to enter the July 13, 1982 Deferred Payment and Security Agreement, defendants falsely and fraudulently represented (a) that they intended to abide by the terms of the agreement, (b) that various assets were pledged, or would be pledged, as security for defendants' obligation to Vuitton under the agreement, and that defendants would execute various documents to confirm and perfect Vuitton's security interests in the foregoing assets, and (c) that they would not further transfer or encumber certain securities or assets pledged to Vuitton.

21. In fact, defendants' representations were false and misleading, and defendants knew those representations to be false and misleading, in that (a) defendants had no intention of abiding by the terms of the agreement, and in fact, repudiated the agreement almost immediately after it was entered into, (b) defendants had no intention of executing the documents which they agreed to execute under the July 13, 1982 Deferred Payment and Security Agreement in order to perfect Vuitton's security interests and rights in various assets,

and (c) defendants intended to further transfer and pledge to others certain assets which they had pledged or agreed to transfer to Vuitton, in violation of their representations and agreements. Defendants representations were further false and misleading in that defendants knew they were not in a position to fulfill the terms of the agreement.

22. By means of the foregoing, defendants obtained credit from Vuitton and an extension of their obligations to Vuitton, and they incurred a debt to Vuitton of \$100,000 which remains outstanding in the amount of \$79,757.36, plus interest by false pretenses, false representations and actual fraud, and by means of statements which were materially false and misleading.

23. The debt owed by defendants to Vuitton pursuant to the July 13, 1982 Deferred Payment and Security Agreement, including interest and the costs and attorneys fees to which Vuitton is entitled thereunder, is a nondischargeable indebtedness pursuant to 11 U.S.C. § 523(a)(2)(A) and (B).

THIRD OBJECTION TO DISCHARGE

24. Upon information and belief, defendants obtained hundreds of thousands of dollars of profits from their illegal activities as set forth above and from their other business ventures.

25. Upon information and belief, in order to avoid the payment of their debts, and with intent to hinder, delay and defraud their creditors and the officers of the estate, defendants have, within one year of the filing of their petition, and thereafter, transferred, removed and concealed their cash, assets and property, including the huge profits from their illegal business activities.

26. Upon information and belief, in order to avoid the payment of their debts, and with intent to hinder, delay and defraud their creditors and the officers of the estate, defendants have, within one year of the filing of their petition, and thereafter, transferred, removed,

concealed or destroyed a substantial quantity of goods and assets, including goods and assets used in their unlawful counterfeiting scheme.

27. By reason of the foregoing, defendants are barred from a discharge of their debts pursuant to 11 U.S.C. § 727(a) (2).

FOURTH OBJECTION TO DISCHARGE

28. Upon information and belief, with intent to hinder, delay and defraud their creditors and officers of the estate, and in order to conceal their unlawful activities and counterfeiting operations, defendants have concealed, destroyed, mutilated, falsified, and failed to keep and preserve books, documents, records and papers concerning their financial condition and business transactions, including their illegal activities in manufacturing and selling counterfeit merchandise.

29. By reason of the foregoing, defendants are barred from a discharge of their obligations pursuant to 11 U.S.C. § 727(a) (3).

FIFTH OBJECTION TO DISCHARGE

30. Upon information and belief, with intent to hinder, delay and defraud their creditors and officers of the estate, and in order to conceal their unlawful counterfeiting operations, defendants have, in and in connection with these Chapter 7 proceedings, knowingly and fraudulently made false statements under oath, including among other things:

(a) false statements in their Statement of Financial Affairs, Statement of Assets, and Statements of Liabilities concerning their income, assets, accounts, the transfer and current locations of their assets, and the maintenance of books and records; and

(b) false statements in their Statement of Financial Affairs and Statements of Liabilities concerning defendants' liabilities to Vuitton and Vuitton's security interests in their assets.

31. By reason of the foregoing, defendants are barred from a discharge of their debts pursuant to 11 U.S.C. § 727(a) (4) (A).

SIXTH OBJECTION TO DISCHARGE

32. In their Statement of Financial Affairs and other statements submitted to this Court under penalty of perjury, defendants have claimed to have more than \$1,513,671 of debts and only \$76,875 of assets.

33. Defendants have failed to explain satisfactorily the loss of the substantial profits from their operations, the loss of their assets, and the gross deficiency of their assets to meet their stated liabilities of more than \$1,513,671.

34. By reason of the foregoing, defendants are barred from a discharge of their debts pursuant to 11 U.S.C. § 727(a) (5).

SEVENTH OBJECTION TO DISCHARGE

35. According to defendant's Statement of Financial Affairs, Statement of Assets, and Statement of Liabilities, defendants have incurred more than \$1,513,671 of debts and have only \$76,875 of assets.

36. Upon information and belief, defendants systematically incurred huge debts to their creditors, including Vuitton, at a time when their liabilities greatly exceeded their assets and they had no realistic hope of repaying those debts.

37. Defendants incurred the foregoing debts by fraudulently representing to creditors that they intended to meet their obligations, when in fact defendants could not, and did not intend to do so, and by failing to inform creditors that, at the very time those debts were incurred, defendants were hopelessly insolvent and had no reasonable possibility of paying their debts as they came due.

38. Defendants acted with intent to deceive, defraud, and steal from their creditors, and defendants' conduct constitutes actual larceny from their creditors.

39. By means of the foregoing, defendants were able to incur huge debts far exceeding their assets, causing Vuitton and defendants' other creditors huge losses and inability to recover the debts owed to them.

40. By reason of the foregoing, defendants are barred from a discharge of their obligations to Vuitton pursuant to 11 U.S.C. § 523(a)(2)(A)-(B), (4), and (6).

EIGHTH OBJECTION TO DISCHARGE

41. Upon information and belief, defendants have knowingly and fraudulently, in and in connection with this case, withheld from the officers of the estate truthful and accurate recorded information concerning their financial affairs, assets and liabilities.

42. By reason of the foregoing, defendants are barred from a discharge of their debts pursuant to 11 U.S.C. § 727(a)(4)(D).

WHEREFORE, Vuitton prays that this Court enter Final Judgment:

- (a) determining that defendants' indebtedness to Vuitton is nondischargeable; and
- (b) denying defendants any discharge in this proceeding,

together with such other and further relief as the Court may deem appropriate, including an award of its costs and attorneys' fees in connection with this proceeding.

Dated: November 1, 1983

REBOUL, MACMURRAY, HEWITT,
MAYNARD & KRISTOL

By /s/ J. Joseph Barits—per DSE
A Member of the Firm
Attorneys for Plaintiff
Vuitton et Fils S.A.
45 Rockefeller Plaza
New York, New York 10111
Telephone: (202) 841-5700

—and—

BUCHBINDER & ELEGANT, P.A.

By _____
A Member of the Firm
Attorneys for Plaintiff
Vuitton et Fils S.A.
46 Southwest First Street
Miami, Florida 33130

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

[Title Omitted in Printing]

**NOTICES OF DEPOSITION AND FIRST REQUEST
FOR PRODUCTION OF DOCUMENTS OF
VUITTON ET FILS S.A. TO SOL KLAYMINC
AND SYLVIA KLAYMINC**

PLEASE TAKE NOTICE that, pursuant to Rule 7030 of the Rules of Bankruptcy Procedure and Rule 30 of the Federal Rules of Civil Procedure, Plaintiff Vuitton et Fils S.A. ("Vuitton") will take the depositions of the following persons commencing at 10:00 A.M. on the dates set forth below, at the offices of Buchbinder & Elegant, P.C., 46 Southwest First Street, Miami, Florida, before a notary public or some other person authorized by the State of Florida to administer oaths:

<u>Person</u>	<u>Date</u>
(1) Sol N. Klayminc	December 2 and 5, 1983
(2) Karen Handbags, Inc., by director and officer Sol N. Klayminc	December 2 and 5, 1983
(3) Jade Handbag Co., Inc., by director and officer Sol N. Klayminc	December 2 and 5, 1983
(4) Jak Handbags, Inc., by director and officer Sol N. Klayminc	December 2 and 5, 1983
(5) Barry Originals, Inc., by director and officer Sol N. Klayminc	December 2 and 5, 1983
(6) Sylvia Klaymine	December 2 and 5, 1983

The foregoing depositions will continue from day to day until completed. You are invited to attend and cross examine.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 7034 of the Rules of Bankruptcy Procedure and Rule 34 of the Federal Rules of Civil Procedure, defendants Sol N. Klayminc and Sylvia Klayminc are required to produce at the offices of Vuitton's attorneys, Buchbinder & Elegant, P.C., 46 Southwest First Street, Miami, Florida, at 10:00 A.M. on December 2, 1983, and permit Vuitton or someone acting on Vuitton's behalf to inspect and copy the documents described in the annexed Schedule A.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 9016 of the Rules of Bankruptcy Procedure and Rule 45 of the Federal Rules of Civil Procedure, deponents Karen Handbags, Inc., Jade Handbag Co., Inc., Jak Handbags, Inc. and Barry Originals, Inc. are required to produce, at the offices of Vuitton's attorneys, Buchbinder & Elegant, P.C., 46 Southwest First Street, Miami, Florida, at 10:00 A.M. on December 2, 1983, and permit Vuitton or someone acting on Vuitton's behalf to inspect and copy the documents described in the annexed Schedule A.

SCHEDULE A

Definitions

1. The term "documents" means all original documents of any nature whatsoever and all non-identical copies thereof in your possession, custody or control, regardless of where located, and includes, but is not limited to, contracts, agreements, records, books of account, tape recordings, summaries, minutes, notes, agenda, bulletins, notices, announcements, instructions, charts, manuals, brochures, schedules, price lists, telegrams, telexes, teletype, safety deposit box records, cancelled checks, bank statements, creditors' statements, and any other documents as defined in Rule 34 of the Federal Rules of Civil Procedure.

2. The term "Related Entities" refers to Karen Handbags, Inc., Jade Handbag Co., Inc., Jak Handbags, Inc., Barry Originals, Inc., and all other entities over which any of the foregoing, Sol N. Klayminc, or Sylvia Klayminc have control and any entities of which any one or more of them together have more than 25% ownership, directly or indirectly.

Instruction

1. For all of the documents produced, specifically identify to which request or requests for production they are responsive.

Documents to be Produced

1. All documents which refer to, relate to, set forth or describe any and all of the property, assets, cash or accounts of Sol N. Klayminc, Sylvia Klayminc, or Related Entities at all times from January 1, 1978 to date.

2. All records which refer to, relate to, set forth or describe any and all of the bank or brokerage accounts of Sol N. Klayminc, Sylvia Klayminc, or Related Entities from January 1, 1978 to date, including without limitation, all statements, cancelled checks, bank books, and

other records relating to any such bank or brokerage accounts.

3. All documents which refer to, relate to, set forth or describe any income, receipts, revenues, or all sources of income, of Sol N. Klaymine, Sylvia Klaymine, or Related Entities from January 1, 1978 to date.

4. All documents which refer to, relate to, set forth or describe the business or businesses, of Sol N. Klaymine, Sylvia Klaymine, or Related Entities from January 1, 1978 to date, including but not limited to all business records and documents relating to all business transactions during the foregoing period.

5. All documents which refer to, relate to, set forth or describe any payments, disbursements, debts, or obligations incurred by Sol N. Klaymine, Sylvia Klaymine, or Related Entities from January 1, 1978 to date.

6. All documents which refer to, relate to, set forth or describe any transfers of cash, assets, or other property or interests by Sol N. Klaymine, Sylvia Klaymine, or Related Entities from January 1, 1978 to date.

7. All federal, state or city tax returns prepared or filed by Sol N. Klaymine, Sylvia Klaymine, or Related Entities from January 1, 1978 to date.

8. All documents which refer to, relate to, set forth or describe any money, property, or other interests of Sol N. Klaymine, Sylvia Klaymine, or Related Entities located in any foreign country, or to any business transacted by any of the foregoing persons in a foreign country, or to any income earned by any of the foregoing persons in a foreign country, from January 1, 1978 to date.

9. All documents which refer to, relate to, set forth or describe any taxes, fees or tariffs which Sol N. Klaymine, Sylvia Klaymine, or Related Entities have paid or owed to any foreign nation or government, or which such nations or governments have claimed to be owed, from January 1, 1987 to date.

10. All documents which refer to, relate to, set forth or describe any investments, purchases or acquisitions of

any property, securities or interests by Sol N. Klayminc, Sylvia Klayminc, or Related Entities from January 1, 1975 to date.

11. All documents which refer to, relate to, set forth or describe Vuitton et Fils S.A. ("Vuitton"), or the trademark, rights, interests, or claims of Vuitton, or the Deferred Payment and Security Agreement entered into with Vuitton on July 13, 1982.

12. All documents which refer to, relate to, set forth or describe any income or proceeds from the manufacture, sale or distribution, by any reason, of any merchandise bearing a Vuitton trademark or a representation or likeness of a Vuitton trademark, or any merchandise having a likeness to Vuitton merchandise, from January 1, 1975 to date.

13. All documents which refer to, relate to, set forth or describe any merchandise, or the manufacture, sale or distribution, by any person, of any merchandise bearing a Vuitton trademark or a representation or likeness of a Vuitton trademark, or any merchandise having a likeness to any Vuitton merchandise, from January 1, 1975 to date.

14. All documents which refer to, relate to, set forth or describe any transactions, negotiations, agreements, or plans, by any person, to manufacture, sell, or distribute any merchandise bearing a Vuitton trademark or a representation or likeness of a Vuitton trademark, or any merchandise having a likeness to any Vuitton merchandise, from January 1, 1975 to date.

15. All documents which refer to, relate to, set forth or describe any bankruptcy proceedings of, or the possibility of filing any bankruptcy proceedings by, Sol N. Klayminc, Sylvia Klayminc, or Related Entities.

Dated: New York, New York
November 1, 1983

REBOUL, MACMURRAY, HEWITT,
MAYNARD & KRISTOL

By /s/ J. Joseph Bainton—per DSE
A Member of the Firm
Attorneys for Plaintiff
Vuitton et Fils S.A.
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 841-5700

—and—

BUCHBINDER & ELEGANT, P.C.

By

A Member of the Firm
Attorneys for Plaintiff
Vuitton et Fils S.A.
46 Southwest First Street
Miami, Florida 33130
Telephone: (305) 358-1515

To: DANIEL L. BAKST, Esq.
P.O. Drawer 3948
West Palm Beach, Florida 33402

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

78 Civ. 5863 (CLB)

VUITTON ET FILS S.A., and LOUIS VUITTON S.A.,
PLAINTIFFS

—against—

KAREN BAGS, INC., JADE HANDBAG CO., INC., SOL N.
KLAYMINC and JAK HANDBAG INC., DEFENDANTS AND
ALLEGED CIVIL CONTEMNORS

—and—

BARRY DEAN KLAYMINC, GERALD J. YOUNG, GEORGE
CARISTE S.M.E., S.A. CRYSTAL, S.A. DAVID ROCHMAN,
ROBERT G. PARISEAULT, Esq. and NATHAN HELFAND,
ADDITIONAL ALLEGED CIVIL CONTEMNORS

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed affidavits of J. Joseph Bainton, Esq., and Brian Dowd, and upon all prior pleadings and proceedings heretofore had herein, the undersigned will move this Court before the Hon. Charles L. Brieant, in Courtroom 705, of the United States Court House, Foley Square, New York, New York on July 23, 1984, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting plaintiffs summary judgment in their favor and against alleged civil contemnors Sol N. Klaymine, Barry Dean Klaymine, Gerald J. Young, George Cariste and

Nathan Helfand in the sum of \$538,991.12, together with such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
June 20, 1984

REBOUL, MACMURRAY, HEWITT,
MAYNARD & KRISTOL

By /s/ J. Joseph Bainton
A Member of the Firm
Attorneys for Plaintiffs
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 841-5700

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

J. JOSEPH BAINTON, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and of the firm of Reboul, MacMurray, Hewitt, Maynard & Kristol, attorneys for plaintiffs herein. I make this affidavit based upon personal knowledge in support of the motion pursuant to Rule 56 of the Federal Rules of Civil Procedure of Vuitton et Fils S.A. and Louis Vuitton S.A. (hereinafter collectively "Vuitton") for an order granting summary judgment in favor of Vuitton and against alleged civil contemnors Sol N. Klaymine, Barry Dean Klaymine, Gerald J. Young, George Cariste, and Nathan Helfand in the sum of \$538,991.12.

2. Each of the alleged civil contemnors were convicted on May 24, 1984, of criminal contempt of a permanent injunction of this Court entered on July 30, 1982 (the "injunction"). The alleged civil contemnors are thus collaterally estopped from denying that they are likewise in civil contempt of the injunction.

3. Under the Rule of *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126 (2d Cir. 1979), upon a showing of civil contempt this Court must award Vuitton the reasonable costs of prosecuting the contempt, including

attorney's fees, if the violation of the [injunction] is found to have been willful." *id.* at 130.

4. The expenses suffered by Vuitton thus far to prove the contempt aggregate \$538,991.12. Submitted herewith is the affidavit of Brian Dowd.¹ Mr. Dowd is a certified public accountant and serves as my firm's controller. Among his duties are supervision of the maintenance of my firm's books and records maintained in the ordinary course of our practice. In addition, Mr. Dowd is responsible for the maintenance of certain other books of account in respect of certain funds of Vuitton disbursed by us generally in connection with the enforcement of Vuitton's trademark rights throughout the United States.

5. I have asked Mr. Dowd to advise me of the total amount and breakdown of all expenses (including legal fees) incurred by Vuitton in connection with this contempt proceeding. As mentioned above, they total \$538,991.12 through May 31, 1984.

6. I will make Mr. Dowd available for deposition any day during the week of July 16, 1984, and at that time make all the relevant books and records available for inspection and copying.

7. Accordingly there being no disputed issue of fact, Vuitton's motion for summary judgment should be granted in all respects.

/s/ J. Joseph Bainton
J. JOSEPH BAINTON

[Affidavit Omitted in Printing]

¹ Mr. Dowd prepared this affidavit in draft before leaving for a two week vacation. It is therefore being served unexecuted with the representation that an executed copy will be filed with the Court prior to the hearing on this motion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

AFFIDAVIT

STATE OF NEW YORK)
)
) ss.:
COUNTY OF NEW YORK)

BRIAN DOWD, being duly sworn, deposes and says:

1. I am a certified public accountant and am employed by Reboul, MacMurray, Hewitt, Maynard & Kristol ("Reboul, MacMurray"), as the firm's controller. Before joining Reboul, MacMurray in June, 1983, I was employed by Peat, Marwick, Mitchell & Co. as an audit manager in their Private Business Advisory Services Group.

2. Among my duties are the supervision of the firm's accounting department. The accounting department is responsible for maintaining the firm's financial books and records in accordance with generally accepted professional practice. In addition, the accounting department is responsible for maintaining records relating to funds of Louis Vuitton S.A. ("Vuitton") which are disbursed to various persons (other than Reboul, MacMurray) who provide services relating to Vuitton's United States trademark enforcement program. Such persons include generally licensed private investigators, court stenographers, local counsel in states other than New York and California where Reboul, MacMurray is licensed to practice, and the like.

3. I have been asked to prepare this affidavit in order to explain the total cost to Vuitton of this contempt pro-

ceeding, including costs of investigation. This affidavit is therefore based upon my review of the firm's books and records. I understand that the firm has offered to make these books and records, together with the supporting documentation, available for inspection and copying during regular business hours upon reasonable notice. In addition to making the records available, I will make myself available to answer under oath any questions anyone may have about this topic.

4. The total cost to Vuitton of this contempt proceeding as of May 29, 1984 is \$538,991.12. Of that sum Vuitton has already paid \$365,466.37. The balance of \$173,524.75 represents fees and disbursements for the period from February 1, 1983 to May 29, 1984, for which Vuitton has been billed. The breakdown of those expenses are as follows:

Reboul, MacMurray, Hewitt, Maynard & Kristol (legal fees)	\$300,327.00
Kanner Security (investigative services (including certain services provided by Melvin Weinberg from February 1, 1983 to June 30, 1983)	\$ 54,766.60
Melvin Weinberg (review of tapes; correction of tran- scripts; other trial prepara- tion and attendance at trial)	\$ 17,792.58
Internal Affairs Investigative Services Inc. (certain inves- tigatory services in California; technical services in respect of preparing all post April 5, 1983 videotapes)	\$ 7,877.96
The Stonegate Agency (various investigatory services, including maintaining custody of evidence in Chemical Bank vault)	\$ 33,465.60
MPCS (rental of video and audio equipment for trial)	\$ 10,131.40

Ralph Fink & Associates (preparation of transcripts of video and audio tapes and preparation of deposition transcript of David Rochman)	\$ 11,622.30
Southern District Court Reporters preparation of trial transcript. (This sum is an estimate provided by court reporters in respect of unbilled transcription.)	\$ 1,732.40

Other disbursements paid by
Reboul, MacMurray:

Legal Fees	\$ 3,029.94
Sheriff's fees	500.00
Secretarial overtime	8,976.09
Copying	42,759.06
Travel	3,304.94
Telephone	2,031.60
Word Processing	3,806.26
Lexis	1,493.79
Expenses incidental to night work	5,998.30
Travel and hotel expense for investigators	13,305.38
Other	<u>16,069.92</u>
	\$101,275.28
	<u>\$538,991.12</u>

/s/ _____
BRIAN DOWD

[Affidavit Omitted in Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title Omitted in Printing]

TRANSCRIPT OF PROCEEDING

February 27, 1985
3:37 p.m.

Before:

HON. CHARLES L. BRIEANT,
District Judge.

* * * *

[3] THE COURT: The court has two motions: One is a motion in the civil proceeding for reargument.

If the court has all of the papers on that, that will be treated as fully-submitted decisions.

Is there any additional paper to be received?

The court hears silence.

Also there is a motion on behalf of Mr. Cariste, and unless there is something further to be heard on that subject, I'll consider that at this time.

Mr. Craner.

MR. CRANER: Your Honor, my application is in the letter, and I wrote to you, and also Mr. Bainton has responded.

Very, very simply, your Honor, I don't think that the initial argument that we raised at the time we moved to dismiss and also the initial motions and also what I raise in my motion, post-trial motion—the fact that at the time the order to show cause was obtained, your Honor, there was no evidence that Mr. Cariste had knowledge of the fact that Mr. Klaymine had an injunction against him.

Mr. Bainton opposed the motion, and the only thing that he added was that Mr. Weinberg would testify about this, and also he talked about a conversation between Helfand and Askelund, in which Helfand, according to Mr. Bainton's affidavit, Helfand purportedly told Askelund that [4] Cariste knew about Klayminc's problems.

Your Honor, that just isn't true. We heard—we went through the trial. The whole sequence was that Helfand didn't know who Cariste is.

I spoke to Mr. Helfand today and I asked him, did you ever here of George Cariste before the order to show cause came down, and he said no.

We heard nothing from Askelund at the trial, no notes or anything to indicate that this purported conversation took place, which was the basis for the order to show cause, as to Mr. Bainton.

He talks about the fact that Cariste had manufactured counterfeit goods. That is true, but that is not a crime.

He also stated, in opposing my original motion, that Mr. Weinberg was going to testify about this. Mr. Weinberg testified about a lot of things. He testified the fact that Cariste purportedly had agreed to sell a thousand bags a week or a month, whatever, it was, your Honor, but the one thing that Weinberg didn't say—and Weinberg's testimony regarding the Plaza conversation was not believed by the jury because they acquitted on that count.

But, in any event, Weinberg never said that, "In the conversation that I had with Cariste, Cariste said I knew all about Klayminc."

[5] Your Honor, the whole sequence, the whole pattern, of all these cases was for Weinberg to get these people involved and to make damaging statements. He didn't ask it, and Cariste never said he knew about it.

Cariste never told anyone about his knowledge.
There was no proof.

Now, the jury believed Rochman, and I am not going to at this point argue the jury shouldn't have believed

Rochman. That shouldn't matter because Rochman's testimony regarding Cariste became available one week prior to trial.

When the order to show cause was signed, Rochman was a defendant. Rochman never told Bainton, nor anyone who was part of the special prosecutor's office or involved with them, purportedly about Cariste's knowledge. All of this came after the fact because they had to have some testimony to sustain a verdict about knowledge.

Weinberg couldn't give it, Askelund couldn't give it, Helfand couldn't give it, no one could give it, except Rochman, after the fact, and Rochman didn't give it.

For the purpose of this motion, there was sufficient evidence, at the time of the trial, to convict Cariste. What I am saying, your Honor, is that this order to show cause should never have been signed, your Honor, I believe if we would have asked you to read the grand jury [6] minutes or to see some kind of evidence, if this would have gone in the usual indictment manner, I think your Honor would have been a lot more sympathetic to a motion to dismiss prior to trial.

As I said in our papers, we have got a show here. Here it is and here it is. What Mr. Bainton can't do is—and it's wrong and it's improper for him—to create his case after he gets the order to show cause signed.

Your Honor, I most respectfully urge you to reconsider the decision on our post-trial memorandum—post-trial motion, and for you to find George Cariste should be acquitted.

Thank you.

THE COURT: Mr. Craner, I respect your diligent and thoughtfull representation of your client.

I really think the points you raise are essentially merged to the jury verdict, and it is at this stage no different than if the grand jury had indicted solely on hearsay and later at trial the government developed adequate admissible evidence to convict him.

There are numerous cases, starting with Costello, saying that that is all right.

So I believe, although I certainly do respect the sincerity with which you have presented it, the motion should be, and it hereby is, denied.

[7] MR. CRANER: Thank you, your honor.

THE COURT: Mr. Weininger, is there any reason my sentence should not be imposed at this time?

MR. WEININGER: No, your Honor.

THE COURT: Mr. Klayminc, is there any reason why sentence should not be imposed at this time?

THE DEFENDANT: No.

THE COURT: Mr. Cohen?

MR. COHEN: No, Judge.

THE COURT: Mr. Barry Klayminc, is there any reason why sentence should not be imposed at this time?

THE DEFENDANT: No.

THE COURT: Mr. Comden?

MR. COMDEN: No, your Honor.

THE COURT: Mr. Gerald Young, is there any reason why sentence should not be imposed at this time?

THE DEFENDANT: No, your Honor.

THE COURT: I see. Very well.

Mr. Craner, is there any reason why sentence should not be imposed at this time?

MR. CRANER: No.

THE COURT: Mr. Cariste, is there any reason why sentence should not be imposed at this time?

THE DEFENDANT: No.

THE COURT: Mr. Matarazzo, is there any reason [8] why sentence should not be imposed at this time?

MR. MATARAZZO: No, your Honor.

THE COURT: Mr. Helfand, is there any reason why sentence should not be imposed at this time?

THE DEFENDANT: No, sir.

THE COURT: Mr. Weininger, you may be heard in your client's behalf and present any information in mitigation of sentence.

MR. WEININGER: Yes, your Honor.

May it please the court, prior to today's date, your Honor, I submitted to the court a letter enclosing several reports from Mr. Klaymine's physicians, as well as several hospital records, discharge summaries, and operative reports.

The reason this was submitted, your Honor, was to point out that despite Mr. Klaymine's apparent good health; that is, just by looking at him, one would get the impression he is in good health, and certainly there are claims on the tape he plays golf frequently.

Mr. Weinberg impressed him he was in good health. This simply does not represent the facts of Mr. Klaymine's present state.

In 1980, your Honor, Mr. Klaymine had a transient eschemic episode which, in lay terms, is an impending stroke or cerebral vascular catastrophy.

[9] In light of that, he was admitted for the performance of an angiography, which is injection of dye into the blood vessels in the brain, which is an extremely hazardous test, which is only performed in the presence of very serious medical conditions.

That test bore out the fact that Mr. Klaymine had developed arteriosclerosis of the carotid arteries leading to the brain; that is the left and right carotid arteries.

Mr. Klaymine was treated medically for four months and was given medication, to which he did not respond.

In August of that year he was admitted for a procedure, thromboendoarterioectomy, which is surgical removal of the plaque inside of these vessels.

Fortunately, with respect to the left carotid artery, the surgery was successful.

On the right carotid artery, surgery could not be performed and stenosis, or accumulation of plaque, still remains in that artery. Mr. Klaymine continues to be treated medically for that condition, but as the reports of Doctor Deutsch, and the third physician whose report I submitted, a Doctor Berg, indicate that this is a con-

dition which needs careful monitoring, close watch of diet, and is a condition which could lead to a stroke at any time, a [10] stroke which would—or condition which would require immediate medical attention.

As we would all know, with respect to a stroke, a matter of minutes, terms of proper medical care, could be critical.

If that were all that Mr. Klaymine suffered from, I think that would be enough, in terms of the precarious condition he is in at age 67. Although I stated that in my report, he corrected me he is 65.

In February of 1982 he suffered a myocardial infarction, which was documented not simply by the symptoms with which he presented at the hospital, but by changes in his cardiac enzymes, which were the enzymes released by the heart at the time of the heart attack.

He was hospitalized for two weeks at that time, and subsequent tests revealed the fact there was other necrotic, or dead, tissue in the heart, presumably from a previous silent heart attack.

Since that time, Mr. Klaymic has been seen on a continuing basis. He has been treated with medication, careful diet, efforts to reduce stress, all in an effort to avoid what Doctor Deutsch, a noted cardiologist, said is the possibility of bypass surgery in his heart.

He is described in these various reports as having generalized arteriosclerosis; that is, [11] arteriosclerosis, or hardening of the arteries, throughout the various parts of his body, the heart being one place and the carotid arteries being another.

In light of these two conditions, Mr. Klaymic—for Mr. Klaymic it is essential his diet be carefully monitored, that he lead a life that is as free from stress as possible, and that he be routinely checked for any medical emergency that might arise, both routinely and, as I say, for any emergency.

These are conditions which require immediate attention. Because of these conditions, your Honor, a sentence of

imprisonment for Mr. Klaymic, we submit, would be tantamount to a death sentence.

Imprisonment for Mr. Klaymic would deprive him of the conditions that are necessary for the maintenance of his very existence; that is, proper diet, lack of stress, exercise, regular medical checkups and the availability of immediate medical care if there is any difficulty in his condition.

I don't mean to diminish the crime of criminal contempt, your Honor. Certainly whether it's a contempt of court by virtue of the sale of drugs or the commission of a violent crime, it is still a contempt of court.

But in this particular case, the act of contempt [12] was, although as I say, a serious crime, was the manufacture or contemplated manufacture of counterfeit handbags, which did not pose a real threat to the public, and while the disregarding of court orders is a serious matter and would be something—and is certainly something—that the court should address, to submit Mr. Klaymic to what we submit is tantamount to a death sentence for that underlying act is simply cruel and unusual and excessive punishment.

I am not saying I don't appreciate the dilemma the court is in, in so far as Mr. Klaymic has previously been placed on probation, and the instant offense was committed during that period.

I don't have an easy answer to that, but I can say that the sentence of imprisonment would be cruel and unusual under these circumstances.

Again, not to diminish the significance of the crime of criminal contempt, your Honor, but in mitigation, although Mr. Klaymic had done this before, and the tapes do not reveal a great deal of arm twisting to do it again, this was a situation in which he was, in fact, approached.

He did not initiate it, and while the twisting of the arm was not that great, I firmly believe, your Honor, that had Mr. Weinberg not approached Mr. Klaymic, that

would have been the end of it and there would have been no [13] more counterfitting.

I would point out, in addition, that when Mr. Weinberg met Mr. Klaymic, he was at the low point. He was on the verge of personal bankruptcy. The business—the only business that he knew since immigrating here from Poland was that of the handbag business.

Because of the nature of the economy, the availability of cheap foreign labor, Mr. Klaymic was driven out of that business in New York, and driven out of what was once a lucrative business, and was now a dead business.

Here he was approached at the weakest point in his life, and he was—he fell prey to Mr. Weinberg's entreaties, not that this excuses Mr. Klaymic, but perhaps it offers some degree of explanation for why he did what he did.

I would also point out to the court that Mr. Klaymic has not led a life, contrary to what the probation report says, that is a successfull one from points of view of business and home life.

His life has had tragedies: the suicide death of his daughter; the financial ruin of his business, and Mr. Klaymic is not unfamiliar with the tragedy and with difficult circumstances. This is certainly an instant that took place during those difficult times.

I ask the court to keep these—to consider [14] these factors, your Honor, in imposing sentence on Mr. Klaymine, and I urge the court to impose a sentence that would not involve incarceration and what we would maintain is the hazzard to his life.

THE COURT: Mr. Sol Klaymine, do you wish to say anything only your behalf or wish to present information on mitigation?

THE DEFENDANT: I think my attorney just about said everything.

I am sorry for everything.

THE COURT: Mr. Cohen, do you wish to be heard on your client's behalf and present any information in mitigation of sentence?

MR. COHEN: Yes, your Honor.

I sent—had handed over a letter to the court this morning.

THE COURT: The court has your letter, and the court is not making any findings to the effect that your client committed perjury.

MR. COHEN: Thank you.

Judge, I'll be very brief.

I thought the background portion of the probation report was detailed complete. I have no additions.

I am sure your Honor is familiar with it. I [15] won't go through the emotional problems Mr. Barry Klaymine has had in any detail whatsoever.

Let me point out, Judge, this is a case that, in effect, there was certainly no economic damage beyond the attorney fees and the costs put out by Sol McMurray. Louis Vuitton's products are not damaged in any way. Certainly Mr. Bainton has not shown that to be the case.

In addition, your Honor, the setting of this case is: (a) One in which Mr. Weinberg did approach first, which I think should be considered in mitigation;

and, (b), one in which I think all or most of the defendants indicated a concern about the court order, and indicated a sensitivity to it. There is at least some evidence from which you can infer—and, again, this is on mitigation; this is not on the guilt or innocence part at all—some evidence your Honor can infer there were entreaties that the conduct that was contemplated was not illegal.

Now, as I say, I think, that, therefore, the sentence can be mitigated on that ground.

Judge, I urge you to consider other alternatives than a jail sentence. I note that Barry Klaymic has no prior record whatsoever. He is currently working. He is a college graduate. There is a whole range of possible alternatives to a jail sentence which would, on the one [16] hand, serve the court's interest and the public's interest in vindicating the conduct that occurred here, and

yet, on the other hand, not cause additional ruin to the lives of the people that are before you.

I have spent, as you might imagine, a great deal of time with my client since being assigned. I guess it goes back to June of '83 now, and I am personally aware of the costs that this whole process has taken on him and the effect that it has had on him personally and on his family.

In a very real sense, that is punishment.

Your Honor has, as I said, a whole range of alternative possibilities:

Community service is being used frequently, and in this kind of case, I think it would be perfectly appropriate to impose a sentence of community service;

A fine, for example, that could be paid off over a period of time would also be perfectly appropriate.

Both of those alternatives would permit Barry Klaymic to remain at liberty and to keep his life intact, and would also vindicate the courts and the public's interest in seeing that contempts don't occur because they would be constant reminders to the individual involved in the conduct that the conviction represents.

Judge, I also urge you to take into account sentences that have apparently been imposed on people who [17] were, in some broad sense, similarly situated.

The probation report that I read did not reflect Mr. Rochman's sentence, but I believe that the arrangement between him and Mr. Bainton indicated that if all went well, there would not be a recommendation of jail.

The report indicated that Mr. Pariseault, I believe, was given a six-months' suspended sentence, if my recollection serves me.

Judge, of those two people—in fact, both of those two people: Pariseault, being a lawyer, and Rochman being—as you might recall, were heavily involved in this, much more heavily than Barry Klaymic. Those sentences perhaps reflect the range that ought to be considered with respect to Barry Klaymic.

THE COURT: Both those cases are characterized by contrition and a modest amount of cooperation, if the court's recollection is correct.

MR. COHEN: I think that's a fair statement, Judge.

THE COURT: There is a difference.

MR. COHEN: No question about that, Judge, and I am not insensitive about that.

I think, though, into that balance must be put—and I don't think your Honor did the sentences, but I might be mistaken.

[18] THE COURT: Pariseault, I have.

Pariseault pleaded to slightly different factors. There were some extenuating factors in this case.

MR. COHEN: I am not saying they're innocent, by any means. I am sensitive to the court's concern, and the court may have given credit to some modest amount of cooperation and remorse, but I do thing there were situations in both of those cases or circumstances that were more aggravated than at least what Barry was involved in in this case.

I am suggesting when you balance all that out, there are alternatives to a sentence of incarceration that I am suggesting would be quite appropriate.

Judge, I have nothing to add, except to request that if your Honor is or does impose a sentence of incarceration, I would like to be heard on the issue of bail pending appeal.

THE COURT: Since you are addressing the court, and since it would seem obvious a sentence of incarceration may have to be imposed on one or more defendants here, why don't you save time by discussing that at this point.

MR. COHEN: Now, 18 USC 4133 somewhat changes the standards that are to be applied in this situation. The language that concerned me a great deal was the language that indicated that there had to be a substantial [19] issue of law in fact, and there had to be a likelihood of reversal or order of new trial.

The other conditions are the ones involving a risk of nonappearance or risk of danger to the community.

I don't know how Mr. Bainton feels. I think it's quite clear there neither is a risk of nonappearance or risk of danger to the community.

MR. BAINTON: So stipulated, your Honor.

THE COURT: Thank you.

MR. COHEN: Thank you.

The other condition is that the appeal is not taken for the purposes of delay.

Now, your Honor, despite your Honor's lengthy opinions in this case, and I believe there were two, I think it would be fair to say that there are substantial issues of law in fact which exist in this case.

The real question—and I am not sure your Honor would disagree with that—the real question, it seems to me to be what do the words "likelihood of reversal" mean, and the answer to that—at least the answer that I've come up with, is a case entitled United States versus Miller.

THE COURT: In the Third Circuit?

MR. COHEN: Yes, your Honor.

Now, I confess that the reasoning of the court [20] seemed to me to be a hair convoluted, but the bottom line, it seems to me, makes sense.

THE COURT: Do you have the slip opinion?

MR. COHEN: Do I?

Your Honor, I have it.

THE COURT: The gist of that opinion is probably page ten of the slip, and that's another way of saying that if you would not be honor bound to file an Anders brief—and I don't think that would be the case here—in light of the substantial legal issues tendered to this court and ruled upon, the net result of which I am certain you differ in good faith, all you would have to do was state at least one of them would result in a dismissal or a new trial if ruled upon differently. That would bring you within the Third Circuit opinion.

This court is not familiar with any Second Circuit ruling at all on this point.

MR. COHEN: As far as I know, there is no such decision, your Honor.

THE COURT: I really see no reason why the court should not follow the Third Circuit opinion in Miller.

However, the act applies only if there is: First, a sentence of imprisonment; and, second, an appeal has been filed.

Now, nobody has to file an appeal for some [21] period of time, ten days, and it makes no sense the way it is drawn, and then I assume the court would be required to find which specific issues would be reasonable grounds.

MR. COHEN: Well, my reading of Miller, your Honor, suggests that if your Honor is able to say that there is at least one issue that if ruled upon differently by the higher court, would result in a reversal or order of new trial, it need not—

THE COURT: There is another factor also, and that is that sentences on criminal contempts are in themselves reviewable on appeal, wholly a part from guilt or innocence, as you can recently see from the Gracias opinion in this circuit

MR. COHEN: That's correct, your Honor. I agree with your Honor that the way this section is drawn, it doesn't make sense.

If it makes any difference, I am certainly prepared to file a notice of appeal this afternoon, if you think that's a condition—

THE COURT: Well, that is what it would mean.

MR. COHEN: It's makes more sense to interpret it—I can state in perfect good faith we intend to file a notice of appeal and pursue it.

We haven't gone to the trouble we have gone up to this point merely to harass your Honor.

[22] THE COURT: No body has ever suggested that.

MR. COHEN: I know that, Judge.

THE COURT: The draftsmanship on this important statute is really quite poor.

MR. COHEN: I agree, Judge.

THE COURT: Did I interrupt your presentation?

MR. COHEN: No, Judge. I think—and I'll be happy to respond if Mr. Bainton disagrees with this interpretation of Miller—I think Miller, although it doesn't take the control, suggestions strongly what the outcome on this fact pattern should be.

THE COURT: All right, sir.

Mr. Barry Klaymic, do you wish to say anything on your behalf or present any information in mitigation of sentence?

THE DEFENDANT: Yes, I would, your Honor.

I would just like to reiterate what my counsel has said as far as this entire ordeal taking quite a toll on my family, both myself and my parents, and this has been quite sever punishment in itself.

That's it.

THE COURT: All right.

Mr. Comden, would you like to be heard in your client's behalf or make any presentation to the court in mitigation of sentence?

[23] MR. COMDEN: Yes. Thank you, your Honor.

First of all, I would like to address the probation report section on culpability.

I did not write a letter to the court, as did Mr. Cohen, but I do have some problems with the conclusion—that the Klaymincs and Mr. Young are the "most culpable of the defendants."

I think there are some clear distinctions between Mr. Young's participation in this matter and the participation of the Klaymincs.

First of all, while Mr. Young may have been a major factor in the Vuitton office in the west back in the late '70s, by 1980, he was totally out of the Vuitton business, and he had no involvement with the Vuitton situation until after that time.

Whereas, the Klaymines apparently continued to have involvement with these products after—well after that time.

While Mr. Young may have been a party to a consent decree in California, which I certainly think is an important factor in the court's decision, he has never been held in contempt.

I think that is a significant factor because when you have somebody who has already been before the court charged with contempt and held in contempt—

[24] THE COURT: You see, he is charged here as an aider and abettor of Klayminc's content.

MR. COMDEN: Exactly.

THE COURT: However, from the very facts relied on in the trial here, there is no question in my mind they would charge against him in California as a principal.

MR. COMDEN: Your Honor, I am not disputing that. What I am claiming is there is a distinction between being charged with contempt for the first time and already held in contempt, convicted of a prior contempt.

I think that is the distinction there.

THE COURT: I understand.

MR. COMDEN: I agree with your Honor, that it is a serious factor because the government could have elected to pursue Mr. Young on the contempt charge in California. It certainly would have been to Mr. Young's advantage to have—to have been held in California instead of having to have him come to New York on repeated periods of time; but for whatever reason, Mr. Bainton choose to bring the action here.

So I am not saying that that doesn't put him in a different category, but, by the same token, he has never been convicted of any criminal offense prior to this event.

Finally, I think we need to look at Mr. Young's involvement in this matter. Mr. Young was brought in by [25] Sol Klaymic, at his request and urging, and you

have heard Mr. Weininger go through the problems Mr. Klaymic has had over the last few years.

Well, these were the kind of urgings that were given to Mr. Young in order to get him to become involved in a business he had not been in for some period of time.

Secondly, his involvement in the whole scheme here was merely to try to bring the fabric in, to put Mr.—the operation, to supply the operation with fabric from a source that he had known in the Orient.

He was not going to be involved in the manufacture or distribution of the bags. He was not going to receive any profit from that. His only profit would be as a commission for getting the material, and as he said in the tape, he was not making a grand-theft score on this thing. He was doing it as a favor to Mr. Klaymic for two reasons:

First, because Mr. Klaymic was in desperate straits; and

Secondly, Mr. Klaymic had helped him out before in 1978 when there was some of Mr. Young's fabric, and Mr. Klaymic had not, you know, put the finger on Mr. Young at that time.

Those are very strong factors, and Mr. Young, as the court could see in the tapes and in the discussions [26] that were played before the court, with Mr. Klaymic and Mr. Weinberg, about how reluctant Mr. Young was to get involved in this thing, you know, that he was worried about it and he wanted to know what he was dealing with.

He was only doing it as a favor to him and he was nervous about it, which should have told Mr. Young not to go ahead with it, but he did it because of the constant urgings of Mr. Klaymic.

Secondly, what did he do once he did get involved?

He agreed to provide the fabric. Yet a week later, he called Mr. Weinberg and told him he changed his mind.

Now, maybe that doesn't constitute a defense in the action that was tried before the court, but it certainly is a factor that should be considered in mitigation, your Honor, because here is a guy who had doubts about it to begin with and reluctantly agreed and then changed his mind.

He never supplied even one yard of fabric in any of the bags that were talked about or supplied in this case.

Now, to the contrary, we have had Mr. Rochman, had Mr. Pariseault, we had Mr. Helfand and Mr. Cariste, who were actually dealing in the bags at the time this thing started or at some limited level.

[27] Mr. Young was out of the business until he was urged in to help supply the fabric because he had a particularly good source of fabric.

I am merely trying to indicate to the court that Mr. Young's culpability in this thing does not fall up to the same standards of some of the other defendants, and is certainly not any greater than some of the other defendants that have already pleaded guilty before this court.

Now, the court brought up a good point, these other individuals have gotten up before the court and shown some contrition.

What I would like to point out to the court is that Mr. Young, at a very early stage, was willing to co-operate and help out the prosecution, I mean in terms of what his source was, but his response to that is, "We are going to ask for 35 years in jail." That's what they wanted from the very beginning, was blood from Gerry Young.

THE COURT: It isn't they want blood. They want the court to vindicate its so frequently disobeyed orders by means of general and specific deterrents so this will not be regarded as a trivial matter in the future. That's what they want.

That is not a really unreasonable request.

MR. COMDEN: I understand that, but from Mr. Young specifically.

[28] THE COURT: That has nothing to do with it. The prosecutor doesn't set sentences.

MR. COMDEN: Of course not, your Honor.

THE COURT: If he had it, he could have shown contrition, and he didn't; and he certainly appeared callous and arrogant on the television set where I saw him.

MR. COMDEN: Your Honor, I do want to address that in a minute, but let me just finish this point.

Now, regarding this fact, Mr. Rochman pleaded guilty and showed contrition.

THE COURT: No more about Mr. Rochman. I have covered that already with Mr. Rochman and with you.

MR. COMDEN: All right.

Now, regarding Mr. Young's performance on the tape, I think that's really what it was, your Honor, a performance.

I have known Mr. Young for quite a long time. Mr. Bainton has known Mr. Young for a long time.

THE COURT: He was not aware of the fact he was on camera.

MR. COMDEN: That's correct. He was led to believe he was talking to a major figure in organized crime, and I think if the court looked at Mr. Rochman on the tape, saw the same tapes with respect to Mr. Rochman who was portraying himself as the kingpin, yet on the stand that [29] was all a lie.

What I am trying to indicate to the court is that the appearance on the tape was a performance for the purpose of Mr. Weinberg, who was believed at that time to be Mel West, some big Mafia chieftan, and this is not the Mr. Young I know, and this is not the Mr. Young Joe Bainton knows.

The court got to see Mr. Young in that one limited performance, and there was only one, where I would not contest the court's evaluation that it was an arrogant attempt to, you know, be smarter than the other guy; but by the same token, let's look at what Mr. Young did. He was involved in this think for a week.

He backed out, he called him. That was never presented in a fair manner in the court, but it did come up through the tapes, that he had withdrawn from the whole process, and that was before any of the others had withdrawn, your Honor, and I think that that is also important.

Now, I don't dispute in any way the court's concern its orders be carried out, and Mr. Young, of course, was not a party to this court's order. Certainly I don't think it's a reasonable assumption that a person is going to think about an order emanating from New York in terms of—

THE COURT: Please don't overdo it because he [30] was certainly in violation of the order of the Central District.

That's the way the order was against Mr. Young, wasn't it?

MR. COMDEN: That's correct, and I haven't disputed that, but I am talking about this particular court.

THE COURT: That is kind of a fine argument, he knew he was violating the order of a federal court in California and also aware he was aiding and abetting in violation of a federal court order in New York, that is an awfully-fine argument.

MR. COMDEN: Your Honor, the only reason I bring that up is to just point out, in terms of what this court should do, and I feel that if you look at Mr. Young's background, he has been a law abiding citizen. He has not been charged or convicted of any criminal offense.

He is 45 years old. He has three teenage children, your Honor.

His wife doesn't work.

What I am trying to ask the court and trying to present to the Court is there must be an alternative, on a first offense, to a period of incarceration for a man who has other than this offense, criminal offense, which—of course, he did not specifically intend any contempt for

this court or for the order he was accused and convicted of [31] violating.

I think that the prior counsel's suggestions regarding community service and/or fine would serve that purpose.

The last two years have been utter hell for Mr. Young. Yet if we look what he has done over the last two years, he has started and built up a new business that is completely legitimate, that does not involve any counterfeit merchandise. It's clearly pointed out in the probation report he is making a living off the business.

He is not getting rich. He is trying to pay down the huge debts he has from prior business failures.

He is providing a reasonable environment for his family, and I do not see that any purpose will be served by incarcerating Mr. Young, other than if the court says to make an example to others; and I believe that now there is a criminal statute that covers this, and so I don't believe in the necessity to incarcerate people on acts that occurred two years ago when there is now presently a statute under which these people are put on notice that what they're doing is a crime.

THE COURT: I think he was on notice, I really do think so, but I thank you for your presentation.

THE COURT: Mr. Young, do you wish to be heard personally on your behalf or say anything further in [32] mitigation?

THE DEFENDANT: Yes, your Honor.

All I would like to say is I am truly sorry for what happened.

The pain my family has incurred in the past two years, and the shame my children have had over this thing in the last two years, taught me a lesson that I'm sure it will never happen again, your Honor.

That's all I have. Thank you.

THE COURT: Mr. Craner, you may be heard in your client's behalf and present any information in mitigation of sentence.

MR. CRANER: Thank you, your Honor.

Your Honor, you have before you the complete probation report on Mr. Cariste. My only difficulty with that report is that it seems to indicate that Mr. Cariste was convicted by the jury of all three counts against him.

If your Honor recalls, the jury only convicted Mr. Cariste of selling 25 bags and cutting 75 other bags.

He was acquitted for allegedly offering to sell and provide a thousand bags a month. I would just like to point that out to the court and I so indicated at the time I had an opportunity to read the probation report.

The probation report indicates that Mr. Cariste has never been in trouble before in his whole life. He has [33] worked. He has brought up his family. He's, in effect, been a pretty decent and regular citizen.

The probation report also indicated that there is little likelihood that Mr. Cariste will ever commit a crime again.

Mr. Cariste has been convicted of the 25 and 75 bags. He has never been in any judicial proceeding, civil or otherwise, regarding the counterfitting of Vuitton or any other bags.

I would say, your Honor, at the very most, that even as the jury believed he had knowledge of Mr. Klaymick's injunction, that he still is a layman; and if he has been convicted of it, he has been convicted.

I would say, your Honor, in terms of being venal, in terms of having the intent to commit a crime, I don't think it's really there.

Mr. Cariste's connection with this matter is at most supervision. He did go out in the market and buy 25 bags and sell them to Sol Klaymick.

He did cut 75 bags.

He wasn't part of the scheme, he wasn't made a partner, and I think that is all of his contribution to this.

I think it's minimal. I think that the reasons for him being brought into this, in terms of actual knowing [34]

what he is doing is wrong, is certainly very, very minimal.

The probation report also states, your Honor, Mr. Cariste has also suffered some very, very substantial major medical conditions.

He has been—he went through—he had cancer. A large part of his intestines and other organs were removed. He is still under the care of a doctor.

He is pretty much retired. He can't work. He is not in the Vuitton business. He hasn't been since prior to the order to show cause being issued.

Your Honor, I think because of what Mr. Cariste has been convicted of doing—and we have to deal with that fact—the fact that his record is good, the fact that his association and connection with this matter is minimal, and supervision, the fact that he did not have a knowledge that he himself was under any restraint—and if he has been convicted of aiding and abetting, I think he is certainly a very small character in the scheme that is being unfurled and which is the subject of the order to show cause.

Your Honor, I think it would be appropriate, under all these conditions, that the court be merciful to Mr. Cariste. He knows he has done wrong. He will never do it again, and I think that in order for the punishment to fit the crime, that there be a noncustodial sentence [35] imposed upon Mr. Cariste.

Thank you very much, sir.

THE COURT: All right, sir.

Mr. Cariste, you may be heard in your behalf if you wish to be heard in mitigation of sentence.

THE DEFENDANT: I would like to tell the court I am truly sorry for what has happened, and you can be sure this will never happen again.

Thank you.

THE COURT: Mr. Matarazzo, you may now be heard on behalf of your client, Mr. Helfand.

MR. MATARAZZO: Thank you, your Honor.

If your Honor please, I know Mr. Helfand about 20 years. I have never thought about him as a law breaker.

Mr. Helfand was secure in his tiny little cubbyhole of an office in the backwater of Fort Lauderdale, Florida, when along came the kind of the con men in America, and took him on along a nefarious journey.

This man was capable of fooling senators.

THE COURT: Only crooked senators.

MR. MATARAZZO: Thank you, your Honor.

THE COURT: It's true. They found one person who wouldn't take it, if you're talking about the so-called Abscam sting. I assume you are.

They found a Congressman who said he was [36] desperately in need of money, but he wouldn't take it.

MR. MATARAZZO: Well, now that I have him off on the wrong foot, let's try the right foot.

THE COURT: All right, sir.

MR. MATARAZZO: Mr. Helfand at the time did not manufacture handbags, never had, was not a party to any injunction on these companies or any companies of this country.

He became involved in something that he never did understand until he was served with an order to show cause, and I dare say to this court that today half the bar in this country does not know the penalties for criminal contempt of a federal judiciary. They're disastrous.

To impute that knowledge to a layman is asking a little much; but, at any rate, this case has destroyed Mr. Helfand. His business is a shambles.

The probation report will show this man suffered a heart attack.

He also served in the Great War as a sergeant for over four years. He is married; lives in Florida.

If your Honor please, I would ask the court to realize one thing:

In looking over the probation report, I don't know who wrote it. I thought it was the probation officer, but

I have been led to believe that part of the evaluation [37] may have been written by Mr. Bainton.

THE COURT: The evaluation is never written by anybody except the probation officer.

However, the so-called government's version, or the preliminary part of it, does receive input from the prosecutor. That is the standard practice in the district, as I understand.

The officer looks at the papers in the case and does get information. In fact, it says so on page 5 of the preamble.

I happen to have Mr. Young's report in my hand, but I am sure your client's is the same. It's here on the bench.

MR. MATARAZZO: What I was getting to was the evaluation in my client's report.

If my memory serves me, your Honor, it says Mr. Helfand was the least culpable of all the defendants.

Now, your Honor, I only ask, nay, I beg this court, to temper justice with mercy.

This man has never been given a chance at, or in probation. This is his first bite of the apple.

If your Honor please, this man spent four years of his life defending the laws of this country. I only ask that the laws of this country are not turned into a scourge to destroy him, because he is close to being destroyed now.

[38] He made no money. He didn't make a penny out of this thing. In fact, he is financially independent.

He has suffered a great deal. He is an ill man.

What can anyone gain by putting him in a detention home?

He is an old man. Without him, by the way, there would have been no United States against all these defendants. He was a perfect pawn for Mr. Weinberg. He is a fool, Judge.

I ask you not to punish him any more. It will destroy him.

I thank you for your courtesy, your Honor.

THE COURT: All right, sir.

Mr. Helfand, do you wish to be heard in your behalf or give any further information in mitigation of sentence.

THE DEFENDANT: The only thing I would like to say, in addition to what my counsel has said, your Honor, I am sorry for what has transpired, and it will never happen again.

THE COURT: All right, sir.

Does the special prosecutor have any comments or recommendations?

MR. BAINTON: Your Honor, I have about three things to say, and I would like to respond on Mr. Conen's [39] remarks about the Bail Reform Act:

One, on behalf of Attorney General Meese, whos interests I am supposed to represent, I would like to object to Mr. Weinberg's unkind remarks about the federal prison system. I think your Honor knows better than I do they are, on balance, untrue;

Two, I would like to reaffirm our view on general deterrence. I can't express it any I better, and defer to the courts;

Three, there is a complete absence of contrition. We still don't know who the manufacturer was in Japan.

I would like to correct Mr. Comden's remark with respect to Mr. Young. If your Honor reads the Ninth Circuit's opinion in that case, you will see that while that case was on appeal, Mr. Young was charged with criminal contempt for violating a similar order of the Ninth Circuit, which in substance restored the preliminary injunction of the Central District.

That case was never tried. He was never convicted of that charge. As the court is aware, the case settled.

With respect to my knowledge of Mr. Young, I have only known him in the courthouse.

There has been no prosecution in California because it seemed to us a complete waste of time to try [40] the same case in two courthouses.

We think, as the court has indicated, it's appropriate that you take Mr. Young's contempt of Judge Reale's order into account when you impose sentence in these proceedings.

Finally, in respect to Mr. Helfand, but for Mayor Erichetti, there would be no Abscam. But for Mr. Helfand, there would have been no "bagscam".

Whether that makes him a pawn or chief architect is a matter apparently Mr. Matarazzo and I disagree.

THE COURT: You don't claim he is the chief architect, do you?

MR. WEININGER: He stood there—but for Nate Helfand, we never would have found Sol Klaymine; but for Helfand, we never would have known Rochman existed; but for Helfand, we never would have known Pariseault existed.

THE COURT: He is not the most culpable of the group.

MR. BAINTON: I didn't say that. It doesn't necessarily make him a pawn, either.

THE COURT: All right.

The court makes the following general observations for the purpose of sentence: To the extent any defendant has more than one count, the court regards them as matters proper for concurrent consideration and [41] that the quality of the totality of the act is what we are concerned with here. If it's broken up into separated specifications, that adds very little.

The court instructs each of the defendants that you have an absolute right to appeal from a final judgments of conviction about to be heard in your case to the Court of Appeals of the Second Circuit and that appeal can be taken within ten days by filing a notice of appeal.

If any of you are indigent, the court will allow you to proceed without payment of fees, and counsel will be appointed for you by the Court of Appeals.

Furthermore, in that appeal, besides raising any issues as to guilt or innocence, or raising any issues as to any of the proceedings below, which may affect a substantial right, you also have a right to review, on appeal, the sentence.

Do each of you understand your right to appeal?

MR. COHEN: I can explain it to him.

MR. WEININGER: Mr. Klayminc does.

MR. COMDEN: Yes, your Honor.

MR. CRANER: The same with Mr. Cariste.

MR. MATARAZZO: The same with Mr. Helfand.

THE COURT: Does anyone want the court to order that you proceed in forma pauperis?

[42] MR. COHEN: Your Honor, I am technically assigned to Barry Klaymic.

THE COURT: You want such an order?

MR. COHEN: Yes.

THE COURT: So ordered.

MR. WEININGER: The same for Mr. Klayminc, your Honor.

THE COURT: You are assigned counsel?

MR. WEININGER: No, but in discussing Mr. Klayminc's financial condition your Honor, I think this may be appropriate.

THE COURT: The court believes it is appropriate and it is so ordered in the case for Mr. Sole Klaymic.

You, Mr. Weininger, should file a notice.

MR. WEININGER: Yes, your Honor, I intend to.

THE COURT: You will have to apply in the Court of Appeals if you want to be relieved because they won't pay unless you are on the panel.

Do you understand that?

MR. WEININGER: Yes.

THE COURT: Anyone else who has a problem?

MR. MATARAZZO: Yes, your Honor.

On Mr. Helfand's behalf, I will file the notice, but he can't possibly afford the appeal.

THE COURT: He may proceed in forma pauperis, [43] but you have to apply to the Court of Appeals if you don't wish to do it gratis.

Mr. Bainton, if you want to say anything about the legal issues involved in Section 3143, you probably could do that at this time because that will be easier for the court.

MR. BAINTON: I am sorry, sir. I can't hear you.

THE COURT: If you want to talk about Section 3143 of the Comprehensive Crime Control Act, it would be easier for the court if do you so now.

Mr. Cohen has already been heard on the point, and I assume the other defendants are adopting Mr. Cohen's argument.

MR. BAINTON: Your Honor is aware of the position I have taken in connection with another case, entitled United States ex rel. Vuitton against Matthias, which was heard before the United States Court of Appeals for the Second Circuit, I believe, in December, around either before or after Christmas.

Your Honor, what I said in that case I say here. There is hardly an issue that goes to the nuts and bolts operation of the criminal justice system more than release pending appeal.

I think it is very inappropriate for me to express such a view in this circuit where Mr. Giuliani has [44] declined to do so.

I have read the Third Circuit slip opinion. I think Mr. Cohen's characterization of it is accurate.

I don't know whether the court's rulings in this case, in light of the Second Circuit's case in Matthias, viewed is substantial. To me it's a close question. It can go either way. I express no opinion, your Honor, one way or the other.

THE COURT: All right. Thank you.

The court notes that the Matarazzo I case, to which reference has made, has no bearing whatever because Matthias was before the court on a plea of guilty, and the only issue was the reasonableness or appropriateness of the sentence, which was appealable.

Accordingly, the issues raised here concerning bail pending appeal do not apply, are not anywhere similar to the issues raised in the Matthias case.

The court believes generally that the decision of the Third Circuit in United States against Stanton Miller, filed January 18, 1985, is essentially correct, in that the defendant now has the burden of proving, if he seeks bail pending appeal, the satisfaction of the criteria established under the Act; and following such submission by the defendants, the court must find, in order to permit a defendant to appeal:

[45] First, the defendant is not likely to flee or pose danger of the safety of any other person or the community if released;

Second the appeal is not for the purpose of delay;

Third that the appeal raises a substantial question of law or fact;

And, four, that if that substantial question is determined favorably to the defendant on appeal, that decision is likely to result in a reversal or an order for a new trial of all the courts upon which the sentence has been imposed.

That's quoting substantially from the Miller opinion.

The court believes that Congress could not have intended the literal meaning of the language in Subparagraph 2 of Section 3143 (b) of the Comprehensive Crime Control Act of 1984, because those words, "The appeal raises a substantial question of law or fact likely to result in reversal or an order for a new trial."

If it were taken literally, it would mean that a trial judge would be under a moral and legal duty to order a new trial himself. Indeed, this court would do so if the court were convinced that a substantial question

likely to result in reversal or a new trial existed in the record [46] in the case of any of these defendants.

So, in short, if the court believed that the appeal would be likely to result in reversal, then the district court would be aware of adequate grounds under Rule 33 to order a new trial at least, and would be compelled to do so, so I believe the correct resolution of this is as suggested by Judge Sloviter, writing for the Third Circuit panel, that Congress could not have intended literally, and the district judge could grant bail only if he finds that his own rulings are likely to be reversed.

The legislative history of the Bail Reform Act makes it clear that the purpose of the act is merely to reverse the former presumption which was in favor of bail, but not to deny bail entirely to persons who have legitimate grounds for appeal, even if the court regards those grounds as unfounded.

The Court of Appeals in the Third Circuit said the following, and the court finds this language quite appropriate: "We are unwilling to attribute to Congress the cynicism that would underlie the provision were it to be read as requiring the district court to determine the likelihood of its own error. The district court who, on reflection—the district judge who, on reflection, concludes that he or she erred, may rectify that error when rulling on post-trial motions. Judges do not knowingly [47] leave substantial errors uncorrected or deliberately misconstrued.

"Thus it would have been capricious of Congress to have conditioned bail only on the willingness of a trial judge to certify his or her own error.

"For similar reason, the phrase 'Likely to result in a reversal,' or 'An order for new trial', cannot reasonably be construed to require the district court to predict the probability of reversal. The federal courts are not to be put in the position of bookmakers, who trade on the probability of ultimate outcome."

"Instead, that language must be read as going to the significance of the substantial issue as to the ultimate disposition of the appeal. A question of law or fact may be substantial, but nonetheless, in circumstances of a particular case, be considered harmless, to have no prejudicial effect or to have been insufficiently preserved.

"A court may find that reversal or a new trial is likely only if it concludes that the question is so integral to the merits of the conviction on which the defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial."

That's the end of the quotation of the Third Circuit. [48] Furthermore, the court can rely on the totality of the record here, including the post-verdict motions and this court's prior decisions and opinions with respect thereto.

Insofar as entering into the position of a bookmaker, any district judge in this particular circuit who tried to be a bookmaker would be condemned to starvation.

Be that as it may, while I don't endorse some of the relatively new theories, particularly the contention of outrageous government conduct, violative of Constitutional due process, which has been tendered here, there is no absolutely final appellate decision in this circuit; and this theory, in defendants' other contentions, fully set forth in their post-verdict motions, do, taken as a whole, constitute sufficiently substantial questions of mixed facts of law to which various authoritative precedents attach, to varying degrees of significance, and so I believe they would meet the Third Circuit criteria as to each one of them.

The court will now consider generally the issue of sentence. The maximum sentence for criminal contempt in this circuit has now been fixed at 5 years, in light of the Gracias decision recently handed down, which is still in slip opinions.

[49] The new statute making this conduct a federal felony, without regard to the prior existence of an injunction, likewise carries a 5 year maximum penalty.

The parole guidelines for each defendant presently before the court as applied would result in the service of two thirds of the sentence imposed if the sentence exceeds one year to a maximum of 20 months, which happens to be one third of the maximum of 5 years.

The main purpose of sentence here is to sustain the rights of trademark holders to require obedience to this and other orders of a court of like nature previously made and to be made in the future, to vindicate the right of society and vindicate the rights of the holder of a valuable property, and also pertain to the public purposes of general and specific deterrents.

The court begins its consideration with Mr. Sole Klaymic. Mr. Sol Klaymic is regarded by the court as a principal manufacturer here with respect to a crime committed while on probation.

The court finds and concludes that the health reports submitted do not militate against a sentence of imprisonment in the context of the modern federal prison system, and that applies to each defendant making a health claim here, even if those reports are accepted at face value. [50] I caution each participant that if their health condition changes materially pending appeal, he may advise the court.

The court is certain that anybody with a health problem today receives adequate care in the federal system, and that this argument that the term of imprisonment is tantamount to a death sentence is just so much cant that won't stand up in the light of day.

The court regards Mr. Klaymic as being the principal malefactor. Mr. Klaymic is sentenced to a subsequent term of imprisonment 5 years concurrent on all the counts.

Mr. Gerald Young is regarded as the next most culpable. He showed a callous and depraved attitude towards

the victim of the crime and towards his duties. He was directly under an injunction in California at the time.

The court assumes there will be no prosecution out there for anything that he did which is covered in his dealings with Weinberg.

He was a principal factor in the plan because he was the source of the fabric. It is still true the source of the fabric is unknown and the fabric was apparently so profitable they were able to destroy the dies or printing machinery after the design had been presented.

As the fabric supplier, he is somewhat like the [51] sugarman in the old fashioned bootlegging cases. Without the sugarman, you can't have distilling operation.

Mr. Young has a prior history of ripping off Vuitton. As to him, the court must vindicate the rights of society and also the direct victim, and it is true he did change his mind and appeared to withdraw from the matter.

Mr. Young is committed to the custody of the Attorney General for a term of two and a half years.

Barry Klaymic is regarded by the court as having a lesser culpability and a victim, in part, of his loyalty and faith to his own father, and he has no prior record.

However, it's serious, and the court and society has to send a message in his case, too, and Mr. Barry Klaymic is sentenced to the custody of the Attorney General for term of nine months, concurrent.

Mr. Helfand is less culpable. However, he engaged in a crime motivated by greed. The court is cognizant of lack of any prior wrongdoing, and his honorable discharge and various other factors in his favor.

The court sentences Mr. Helfand to custody of the Attorney General for a term of six months.

Mr. Cariste is less culpable than the other participants, with the possible exception of Helfand and Barry Klaymic. The court's cognizant of his health problems. The same things are said as to him applies [52] likewise to the same as Sol Klaymic. Mr. Cariste is sentenced to the

custody of the Attorney General for a term of nine months.

Each of the defendants is continued on his bail pending appeal, the court finding, as indicated earlier, that each of you come within the statute and have shown that you're not likely to flee and that you have appeals which fit the Third Circuit requirements.

The court will be in recess.

(Time noted: 4:44 p.m.)

SUPREME COURT OF THE UNITED STATES

No. 85-1329

GERALD J. YOUNG, GEORGE CARISTE, SOL N. KLAYMINC
and NATHAN HELFAND, PETITIONERS

v.

UNITED STATES, EX CEL. VUITTON ET FILS S.A., ET AL.

ORDER ALLOWING CERTIORARI

Filed June 23, 1986

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. This case is consolidated with 85-6207, *Barry Dean Klayminc, v. United States ex rel. Vuitton et Fils S.A., Louis Vuitton S.A.*, and a total of one hour is allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 85-6207

BARRY DEAN KLAYMINC, PETITIONER

v.

UNITED STATES EX REL. VUITTON ET FILS S.A.,
LOUIS VUITTON S.A.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with 85-1329, *Gerald J. Young, George Cariste, Sol N. Klayminc and Nathan Helfand v. United States, ex rel. Vuitton et Fils S.A., et al.* and a total of one hour is allotted for oral argument.

June 23, 1986

(4) (2)
No. 85-1329 and 85-6207

Supreme Court, U.S.
FILED

SEP 8 1986

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CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

GERALD J. YOUNG, GEORGE CARISTE, SOL N.
KLAYMINC, NATHAN HELFAND *Petitioners,*

v.

UNITED STATES, *ex rel.* VUITTON ET FILS S.A. *et al.,*
Respondent.

BARRY DEAN KLAYMINC, *Petitioner,*

v.

UNITED STATES, *ex rel.* VUITTON ET FILS S.A., *et al.,*
Respondent.

On Writs Of Certiorari To The United States
Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONERS

WILLIAM WEININGER
845 Third Avenue
New York, NY 10022
(212) 308-3767
Counsel for Petitioner
Sol Klayminc

THOMAS R. MATARAZZO
4009 Fifth Avenue
Brooklyn, NY 11232
(718) 853-4040
Counsel for Petitioner
Nathan Helfand

MITCHEL B. CRANER
666 Fifth Avenue
13th Floor
New York, NY 10103
(212) 757-9850
Counsel for Petitioner
George Cariste

JAMES A. COHEN
WASHINGTON SQUARE LEGAL SERVICES, INC.
715 Broadway, 4th Floor
New York, NY 10003
(212) 505-7400
Counsel for Petitioner
Barry Dean Klayminc

On the Brief:
GAIL HEATHERLY
STUART B. KATZ
JOHN O'HALLORAN
JOHN SIPOS

Legal Interns.
LEONARD J. COMDEN
WASSERMAN, COMDEN & CASSELMAN
5567 Reseda Blvd.
Suite 330
Tarzana, CA 91356
(818) 705-6800
Counsel for Petitioner
Gerald Young

QUESTIONS PRESENTED

1. Whether interested private attorneys may, consistent with the due process clause of the Fifth Amendment and Fed. R. Crim. P. 42(b), prosecute criminal contempt proceedings.
2. Whether, pursuant to Fed. R. Crim. P. 42(b), an interested private attorney may direct an unsupervised investigation in order to obtain evidence to be used in a criminal contempt trial.
3. Whether the Court of Appeals erred in affirming criminal contempt sentences of six months to five years.

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OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at 780 F.2d 179. The opinions of the district court are reported at 592 F. Supp. 734 (decision on pre-trial motions) and 602 F. Supp. 1052 (decision on post-trial motions).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 16, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Rule 42(b) of the Federal Rules of Criminal Procedure, and the Due Process Clause of the Fifth Amendment to the United States Constitution.

Rule 42(b) states:

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

1. Introduction

The issues presented by this case are whether either due process or Fed. R. Crim. P. 42(b) permits criminal contempt cases to be prosecuted by an interested attorney and whether that attorney may conduct a special investigative "sting" operation to obtain evidence for such criminal contempt cases.

In 1978, the luggage company Vuitton et Fils S.A., ("Vuitton")¹ mounted an aggressive, multi-faceted campaign to enforce its trademark rights. As part of this campaign, Vuitton instituted over eighty lawsuits in the Southern District of New York and literally hundreds of investigations and legal actions nationwide. J. Joseph Bainton, Esq. ("Bainton"), a partner in the firm of Reboul, MacMurray, Hewitt, Maynard & Kristol ("Reboul MacMurray"), has appeared as attorney of record for Vuitton in virtually all of these proceedings, including the instant prosecution for criminal contempt, which resulted in prison sentences ranging from five years to six months.²

¹ Vuitton et Fils S.A. and Louis Vuitton S.A. are a single company, called Louis Vuitton ("Vuitton"), which is organized under the laws of the Republic of France. Vuitton has a number of affiliates, none of which are publicly traded. Vuitton has no other related corporate entities required to be set forth pursuant to Rule 28.1 of the Supreme Court Rules. See Respondent's Reply Brief to Petition for Writ of Certiorari n.1.

² The sentences of imprisonment were as follows: Sol Klayminc ("Klayminc"), five years; Gerald Young ("Young"), two and one-half years; Barry Klayminc ("Barry"), nine months; George Cariste ("Cariste"), nine months; Nathan Helfand ("Helfand"), six months (J.A. 162-164). All defendants remain at liberty pending appeal. The Order to Show Cause also contained allegations against David Rochman ("Rochman"), Robert Pariseault, Esq. ("Pariseault") and three corporations owned by Klayminc. None of the latter went to trial.

The injunction defendants were convicted of violating is set out in the Appendix to the Petition for a Writ of Certiorari (Pet. App. D-1). The Order to Show Cause (O.S.C.) sets forth the way in which the injunction was violated (Pet. App. E-1).

The litigation strategy developed by Vuitton combined both civil and criminal sanctions. Initially, Vuitton brought a civil action against an alleged trademark infringer, seeking damages and injunctive relief. Apparently, however, Vuitton has encountered difficulties in obtaining compliance with its civil injunctions and in identifying potential civil defendants. By resort to criminal contempt proceedings, Vuitton has sought to address both problems. Bainton, on behalf of Vuitton, has frequently requested and obtained appointments as Special Prosecutor pursuant to Fed. R. Crim. P. 42(b) (J.A. 19).

In this case, Bainton, again appointed Special Prosecutor, was also permitted to direct an elaborate undercover sting operation completely unsupervised by the United States Attorney or by any other disinterested prosecutor. The sting provided the evidence underlying the charge of criminal contempt against defendants.

The appointment of Bainton as Special Prosecutor led to problems of two distinct kinds. One problem was the actual conflicts of interest under which Bainton operated by assuming the dual role of attorney for Vuitton and Special Prosecutor for the United States. These conflicts of interest are most strikingly demonstrated by three independent civil lawsuits: Klayminc's defamation suit against Bainton and Reboul, MacMurray, filed three months before the "sting"; Klayminc's action for discharge in bankruptcy; and a permanent injunction against Young. The injunction against Young was similar to the injunction against Klayminc and enjoined him from, *inter alia*, aiding and abetting activity infringing Vuitton's trademark. (Final Consent Judgment and Permanent Injunction Nov. 13, 1981. (C.D. Cal. 1981)) (L.1). ³The second problem presented by the appointment of Bainton as Special Prosecutor was the

³ Several items have been lodged for the convenience of the Court in the Office of the Clerk, and will be designated in this brief as "L._____."

reliability of the evidence gathered during the sting.⁴ The Special Prosecutor's conflict of interest and lack of training and accountability lessened the quality of the evidence.

2. The Appointment Of A Special Prosecutor.

This criminal contempt action arose from a civil trademark infringement action, *Vuitton et Fils S.A. v. Karen Bags, Inc.*, 78 Civ. 5863 (CLB) (1982).⁵ In a final settlement, Klaymine, Barry and the family companies agreed to pay \$100,000 plus interest, and consented to the entry of a permanent injunction (Pet. App. D-1), which subsequently formed the basis of the criminal contempt proceeding. The injunction, entered on July 30, 1982, proscribed in pertinent part:

- (b) manufacturing, producing, distributing, circulating, selling, offering for sale, advertising, promoting or displaying any product bearing any simulation, reproduction, counterfeit, copy or colorable imitation of Vuitton's Registered Trade-Mark 297, 594.

(Pet. App. D-2).

⁴ This brief raises the issue of the reliability of the evidence, not to argue that the evidence was insufficient, but to demonstrate the substantial risks to defendants' rights and the adverse impact upon the integrity of the justice system when trained and accountable public prosecutors do not participate in the enforcement of the criminal law.

⁵ There was an earlier criminal contempt case against Klaymine involving a violation of the temporary injunction. The District Court ordered it to be tried before a magistrate as a petty offense. Although Bainton was again acting as Special Prosecutor on behalf of the Court and the public, he sought a Writ of Mandamus from the Second Circuit Court of Appeals to direct the case to be tried in district court as a serious crime, thus making possible the imposition of more serious sentences (Petition for a Writ of Mandamus, R. 557). The Petition was denied. (References to the Record are designated by "R." The references are to the Second Circuit Appendix and Supplemental Appendix, which have been provided to the Court. Although the Appendix and Supplemental Appendix are paginated "A-[page]" and "[page]-A", respectively, references in this Brief will be to the page number only. Thus, "A-25" and "1234-A" will be cited as "R. 25" and "R. 1234").

The injunction also prohibited aiding and abetting the proscribed activities (Pet. App. A-15). However, the injunction made no mention of a conspiracy to violate its terms.

In early 1983, Vuitton retained Kanner Security Group, Inc., a Florida private investigatory firm, for the purpose of undertaking a sting operation to advance Vuitton's trademark enforcement campaign (J.A. 21). Vuitton and Bainton also hired Mel Weinberg ("Weinberg"), the former confidence man central to ABSCAM, whose skills were crucial to the operation of the Bainton-supervised sting. In due course, Vuitton learned through Weinberg of remarks attributed to Klayminc by defendant Helfand which indicated that Klaymine might be able to provide counterfeit merchandise (J.A. 22).⁶ Vuitton also learned that Klayminc had recently acquired an interest in a handbag factory located in the Republic of Haiti (J.A. 22).

On the basis of this information, Bainton filed an affidavit on March 31, 1983, requesting that the District Court for the Southern District of New York appoint him and Robert P. Devlin, then an associate of Reboul, MacMurray, Special Prosecutors pursuant to Fed. R. Crim. P. 42(b). Bainton simultaneously requested permission to undertake certain extraordinary investigative measures because it was unethical for an attorney to surreptitiously record a conversation but no similar prohibition existed against a prosecutor. (J.A. 26). Among the allegations Bainton made was that a "massive international conspiracy" existed to violate the court's injunction (J.A. 25). The Court (Hon. Morris E. Lasker) granted both requests (J.A. 27) and directed, on a related case theory, that the Honorable Charles L. Brieant, the judge assigned to Vuitton trademark litigation, be notified. Judge Brieant instructed Bainton to arrange a "full debriefing of [his] information to the U.S. Attorney." Judge Brieant, relying on Bainton's affidavit,

⁶ Helfand alleged that it was Weinberg who first mentioned Klayminc. Letter from James Cohen, Esq. and Thomas R. Matarazzo, Esq. to Hon. Charles L. Brieant, November 28, 1984 (L. 13). In any event, Helfand was encouraged to reestablish his relationship with Klayminc.

characterized the counterfeiting operation as "more serious than the typical violation of the sort which is commonly referred to in this district as the T-shirt cases." (J.A. 62.)

The debriefing was never arranged. Bainton's affidavit and the court Order were forwarded to the United States Attorney, but no member of that office received any further information regarding the nature of the case or the evidence involved. Instead, after a brief telephone conversation, the chief of the criminal division wished Bainton "good luck" (R. 1801).

3. The "Sting."

The only instructions received by Weinberg, who was principally responsible for the day-to-day operation of the sting, were admonitions "not to entrap" anyone and "not to embarrass the government" (R. 2167). Weinberg never read the injunction (R. 2166), and neither the Order nor the meaning of criminal contempt were ever explained to him (R. 2178). He was never told that the activity in which the defendants were allegedly engaged did not violate any criminal statute⁷ (R. 2162). From the outset of the sting it was clear that Klayminc was not then engaged in counterfeiting activity. He did not possess any materials needed to produce the counterfeit bags, and indeed nothing was ever manufactured in Haiti. Nonetheless, once Bainton was appointed Special Prosecutor, Weinberg approached Klayminc and proposed a joint venture to produce and sell counterfeit Vuitton bags. The entire project was dependent on Weinberg supplying all the machines, dies, and materials and putting up the capital, as well as buying the finished product.⁸

⁷ Weinberg also never met with the Special Prosecutor to discuss in detail what was to be accomplished or avoided at meetings with the objects of the sting (R. 2182-83).

⁸ For example, Weinberg undertook to provide the money to buy the Vuitton material (J.A. 44); to set Sol up in Haiti (J.A. 49); and to provide working capital (R. 769).

The sting yielded many hours of audio and video tapes of conversations touching on many subjects. On numerous occasions, various defendants expressed the belief that if counterfeit Vuitton merchandise were kept out of the United States, the injunction would not be violated.⁹ Weinberg picked up this theme and assured the defendants that their planned activities would not violate the injunction.¹⁰ For example, when Klayminc told Weinberg he would not take the chance of shipping bags to the United States, Weinberg replied that Klayminc could ship to other countries without problems (J.A. 75). Weinberg agreed with the phrase "civil crime" used by Young to describe the proposed venture (J.A. 90), and told Rochman he did not want Klayminc to ship counterfeit bags from Haiti to the United States (R. 1279, 1299). In short, the defendants' understanding about the scope of the injunction was manipulated by Weinberg.¹¹

As noted, defendants Young, Cariste and Helfand were not parties to the Klaymincs' permanent injunction. Despite investigative efforts to determine the state of their knowledge of the injunction, the taped conversations contain only vague and

⁹ For example, Klaymine declared he could not get involved in manufacturing in the United States (R. 1007).

¹⁰ The District Court subsequently charged the jury that manufacture, sale or distribution of counterfeit bags outside the United States would not violate the injunction (R. 2820). Judge Brieant later said: "I gave the charge on that to the jury *because I felt required to do so*, notwithstanding case law that indicates it would have been a violation." (R. 2970) (emphasis added).

¹¹ Typical of these exchanges was a conversation between Weinberg and Klayminc's wife Sylvia Klayminc on April 8, 1983. After Weinberg told her about the plan, he stated that she could soon be selling Vuittons again. Sylvia responded: "No, I won't be able to do it here." Weinberg: "Why?" Sylvia: "Ah, you're not allowed to do it here, I mean, in the United States." Weinberg: "Well, we'll ship to you in Europe, then." When Weinberg indicated that the casinos he represented were in this country, Sylvia protested: "[N]ot in the United States." (J.A. 66). Later in the same conversation, Weinberg said "[w]hat he's got to be careful of . . . anything he brings into the States, that they don't get wise, because they'll be looking for . . ." Sylvia protested again: "You mean, that stuff? He's not going to . . ." Weinberg: "No, no. No, no. I'm talking about money." (J.A. 72).

general statements. For example, Weinberg referred in Young's presence to Klayminc's "troubles" and to Klayminc's getting "caught" (R. 1097). Nowhere in the taped conversation is a description of the terms of the injunction.¹² Weinberg mentions without elaboration a "court order" and an "injunction."

4. The Order To Show Cause And The Trial.

The District Court issued an Order to Show Cause for alleged civil and criminal contempt pursuant to Fed. R. Crim. P. 42(b) upon Special Prosecutor Bainton's application.¹³

The O.S.C. alleged and petitioners were convicted of the following:

Klayminc was convicted of offering to sell counterfeit Vuitton bags, counterfeit fabric, and a fifty percent interest in the Haiti factory; and of selling Weinberg twenty-five counterfeit bags and of having agreed to buy counterfeit fabric from Young and Rochman (Pet. App. E-2).

Barry was convicted of representing to Weinberg that he was fully aware of and involved in his father's counterfeiting operations in Haiti and for stating that in the event of his father's untimely demise, he was ready, willing and able to take over the operations (Pet. App. E-3).

Young was convicted of offering to sell counterfeit Louis Vuitton fabric to Klayminc with knowledge of the existence of the injunction (Pet. App. E-4).

¹² Rochman testified at trial that Helfand told him Klayminc was "under an injunction now" (R. 2360), and that he relayed this information to Cariste, who he believed was fully aware of Klayminc's problems (R. 2363).

¹³ Although counsel for defendants argued that a criminal conviction for violation of the injunction required a completed contemptuous act (R. 91), the court charged that it was sufficient to find that a defendant participated in or did something open, overt, or visible, in furtherance of a violation or a scheme or plan to violate the injunction order (R. 116). Counsel also unsuccessfully urged that a conspiracy to violate the injunction would not constitute a criminal contempt under the terms of the injunction (R. 91, R. 2477).

Helfand was convicted of introducing Weinberg to Klaymine in order to facilitate the sale of counterfeit bags and of aiding and abetting Klaymine by convincing Weinberg to invest in the Haitian operation, both with knowledge of the injunction (Pet. App. E-5).

Caristè was convicted of selling twenty-five counterfeit Vuitton bags and of agreeing to cut and ship pieces to Klaymine for assembly into counterfeit bags with knowledge of the injunction (Pet. App. E-6).

The evidence at trial, which consisted mostly of audio and video tapes produced during the sting, supported the O.S.C.¹⁴

The civil contempt claim was identical to the criminal contempt allegations and became the subject of a motion for summary judgment shortly after the criminal conviction. This motion was filed on June 20, 1984 by Bainton on behalf of Vuitton seeking \$538,991.12 as damages for civil contempt (J.A. 124). This sum includes attorneys' fees of more than \$300,000 and expenses billed to Vuitton by Reboul, MacMurray in connection with the Special Prosecutor's investigative and prosecutorial efforts in the criminal case. Neither Rochman nor Pariseault were named in the motion. The summary judgment motion was denied. The civil contempt portion of the case remains open.

5. The Conflicts Of Interest.

Bainton's utilization of evidence from the criminal investigation to improve the positions of himself and Vuitton in three separate civil suits shows how actual conflicts of interest emerged from his dual roles of Special Prosecutor for the United States and private attorney for Vuitton. These suits

¹⁴ Rochman was alleged to have offered to sell counterfeit Vuitton fabric to Klaymine (Pet. App. E-6). Both Rochman and Pariseault were alleged to have offered to sell Klaymine and Weinberg one thousand completed counterfeit Vuitton bags and apparatus worth \$550,000 to manufacture counterfeit Vuitton bags (Pet. App. E-4, 5).

involving Bainton or Vuitton or both, were related to, but distinct from, the criminal contempt case, and led to confusion regarding which client--the United States or Vuitton—Bainton was serving and when.

In December, 1982, Klayminc stopped making payments on the \$100,000 judgment in favor of Vuitton with a balance remaining of over \$80,000, and filed a defamation action against Bainton and Reboul, MacMurray.¹⁵ During the sting Weinberg attempted to elicit from Klayminc an admission that the defamation suit was frivolous and that the *Wall Street Journal* article which printed Bainton's statement did not harm his business (J.A. 34).

Weinberg also discussed Klayminc's financial situation, and attempted to find out if Klayminc had assets "stashed away safe that nobody knows" (J.A. 31). On July 18, 1983, Klayminc and his wife filed a joint bankruptcy petition seeking a discharge of their debts pursuant to 11 U.S.C. § 727. Vuitton then filed a complaint objecting to the discharge (J.A. 108). On December 6, 1983, Bainton, on behalf of Vuitton, appeared at an evidentiary hearing before the Bankruptcy Court, and introduced into evidence five tapes created while he was the Special Prosecutor which were also later introduced at the criminal trial.¹⁶

¹⁵ Before the sting began, Klayminc filed the defamation action against Bainton and Reboul, MacMurray in New York State Supreme Court, New York County. The complaint was based on a comment reportedly made "gleefully" by Bainton at a press conference and attributed to him in the *Wall Street Journal*. Bainton said of Klayminc:

Even if he doesn't get thrown in the hoosegow . . . [h]e was finger-printed and photographed right next to the muggers and mother-rapers. I'm sure that was an experience he'll remember.

(J.A. 8).

The complaint alleged the statement was false and defamatory and sought recovery for lost business and damage to Klayminc's reputation, totaling \$2,250,000. This action, pending during the sting and criminal trial, was voluntarily discontinued (R. 2927).

¹⁶ The tapes were: 1) April 1, 1983—GX (Government Exhibit) 18; 2) April 5, 1983—GX 83; 3) April 13, 1983—GX 104; 4) April 14, 1983—GX 85; and 5) April 14, 1983—GX 106.

The third civil suit involved a permanent injunction and consent decree entered in favor of Vuitton against Young in November 1981 which enjoined, *inter alia*, assisting or aiding and abetting various trademark-infringing activities. It contained a liquidated damages provision of \$750,000, the satisfaction of which was permanently stayed unless Young violated the terms of the injunction (Final Consent Judgment and Permanent Injunction, November 13, 1983 (C.D. Cal.) (L. 1)). Subsequently, in August 1985, Bainton, on behalf of Vuitton, attempted to use Young's criminal contempt conviction for its collateral estoppel effect to obtain execution of the \$750,000 judgment (*Ex Parte Application for Order to Show Cause Re Contempt* August 7, 1985 C.D. Cal.) (L. 16)).¹⁷

The conflict in Bainton's dual roles is also demonstrated by the way Vuitton's interest affected the plea bargaining process. On May 7, 1984, in his role as Special Prosecutor, Bainton permitted Rochman to plead guilty to contempt as a petty offense in return for Rochman's promise to testify at the criminal contempt trial (J.A. 103). He also granted Rochman immunity from any future prosecution for "any other known or unknown Vuitton trademark violation" (J.A. 105), and agreed that if the plea agreement was complied with, he would recommend a six month probationary term. Such a sentence was later imposed. On the same day, on behalf of Vuitton, Bainton dismissed all civil claims against Rochman (J.A. 106).¹⁸ Over three months after defendants were convicted, Bainton permitted Pariseault to plead guilty to contempt as a petty offense in exchange for a complete debriefing about the subject matter of the O.S.C. and an agreement to testify truthfully regarding "his conterfeiting [sic] dealings in Vuitton merchandise" at

¹⁷ The criminal investigation of Young did not cease when Young declared he had decided not to supply counterfeit material (R. 2284-85).

¹⁸ Bainton, as counsel for Vuitton, also agreed to release all of Vuitton's civil claims against Rochman's wife, Rochman's in-laws, and Rochman's company, Host National Corporation, "in connection with [Rochman's] plea agreement" in the criminal case (J.A. 106).

"any trials or hearings" (Letter from J. Joseph Bainton to John A. O'Neill, Esq. dated September 10, 1984 [plea agreement]) (L. 36). By letter dated September 11, 1984, Bainton, on behalf of Vuitton, agreed with Pariseault to the entry of a permanent injunction and judgment for \$15,000 against Pariseault. This money judgment was held in abeyance, interest free, for a period of five years. (Letter from J. Joseph Bainton to John A. O'Neill, Esq. dated September 11, 1984 [Vuitton release]) (L. 39). Although the agreement between Vuitton and Pariseault was brought to the attention of the court during the plea colloquy (L. 46), all parties claimed there was no relationship between it and the guilty plea. At sentencing the Special Prosecutor informed the court that Pariseault had been forthcoming about the subject of the matter of the Order and "other matters as well" (L. 49).

6. The District Court And Second Circuit Decisions.

The district court denied both the pre-trial motion (Pet. App. B-1) and the post-trial motion (Pet. App. C-1) to disqualify the Special Prosecutor on the grounds of both actual conflict of interest and the appearance of such conflict, relying on *Musidor, B.V. v. Great American Screen*, 658 F.2d 60 (2d Cir. 1981).¹⁹ The court upheld the grant of investigatory authority, holding that the "normal or commonly accepted meaning" of the words "to prosecute" makes it "clear that a special prosecutor's authority under Rule 42 extends beyond simply presenting evidence in court" and includes the authority to investigate (Pet. App. C-16).²⁰ The court sentenced the defendants to custodial sentences ranging from five years to six

¹⁹ Also denied was a motion for a post-trial hearing on the due process issues, cf. *United States v. Myers*, 527 F. Supp. 1206 (E.D.N.Y. 1981), seeking to determine, *inter alia*, whether payment of the legal fees billed to Vuitton by the Special Prosecutor might be *de facto* contingent on performance in the criminal proceeding, and whether the Klaymincs were improperly targeted.

²⁰ The District Court's interpretation is puzzling in light of the fact that the words "to prosecute" do not appear anywhere in Rule 42(b).

months, citing "the rights of trademark holders" as the principal interest to be vindicated (J.A. 162). Subsequently, on Bainton's recommendation, defendants Rochman and Pariseault were sentenced to probation.

A divided panel of the Second Circuit affirmed the criminal contempt convictions (Pet. App. A-1). The majority relied on *Musidor* to uphold the appointment of the special prosecutors. The court stated that it was "not persuaded that Bainton and Devlin were disqualified by their past connections with Vuitton's business, their involvement in previous lawsuits with the defendants, or by any of their conduct in this lengthy litigation." (Pet. App. A-11). Describing the defamation action as "clearly frivolous," the court said it was "entitled to no weight" in its consideration of potential conflicts of interest (Pet. App. A-10). Upholding the granting of investigatory authority, the circuit court stated that the term "to prosecute,"²¹ as used in Rule 42(b), "clearly encompasses the power to investigate and gather evidence through activities such as the Bagscam sting supervised by Bainton and Devlin." (Pet. App. A-12). The court dismissed the argument that the jury instructions incorrectly permitted defendants' conviction for conspiracy to commit contempt, stating that "Barry has unduly focused on one line of a long charge which accurately and completely informed the jury." (Pet. App. A-13). The court also upheld the sentences imposed by the District Court (Pet. App. A-15).

Circuit Judge Oakes, the author of *Musidor*, dissented. He said that the decision permitting the sting investigation to continue was incorrect (Pet. App. A-23). Noting the "history of bitter litigation" between the parties (Pet. App. A-22), which stretched back to 1978, Judge Oakes outlined the "compelling reasons" against granting investigatory authority to a private attorney:

[T]he private lawyer who participates in a sting operation almost necessarily runs afoul of the canons of legal ethics;

²¹ Once again, the words simply do not appear in the rule.

the private lawyer who represents an interested party also lacks the knowledge of legal constraints on the investigatorial process and freedom from bias that a public prosecutor would have.

(Pet. App. A-17).

Judge Oakes also recognized one of the disturbing results of this privately supervised investigation: "My reading of the record indicates . . . that the investigation may have been the proximate cause of the violation." (Pet. App. A-23).

SUMMARY OF THE ARGUMENT

The appointment of an interested private attorney to prosecute a criminal contempt action after conducting a sting investigation into the possible violation of a civil injunction is a violation of a defendant's Fifth Amendment right to due process of law. Furthermore, a criminal contempt punished by a significant prison term is a serious criminal offense, thus entitling the defendants to the full measure of due process rights.

The criminal justice system operates on the premise that a prosecutor is a disinterested party, and thus acts impartially. The existence of a conflict of interest in the prosecutor is inconsistent with the ethical standards by which a prosecuting attorney must be bound and with the prosecutor's obligations to the criminal justice system.

The broad and unreviewable nature of the prosecutor's role is such that reversal is required when a conflict of interest is demonstrated. Reversal is particularly appropriate when the conflict of interest influences the fact-selection process. Here, this interest and lack of training resulted in an investigation which produced unreliable evidence, thus reducing confidence in the ability of the fact-finder to arrive at a just decision. This court can base its decision on the Due Process clause, or use its supervisory power to forbid the appointment of an interested private attorney as special prosecutor in criminal contempts.

Rule 42(b) of the Federal Rules of Criminal Procedure does not grant courts the authority to appoint a private attorney as special prosecutor with complete control of the investigation and prosecution of the case. The text of the rule and its history clearly show that it merely sets out the procedure for dealing with indirect contempts and does not authorize the broad grant of power approved by the Second Circuit. Indeed, such an interpretation violates the doctrine of separation of powers by assuming the power to prosecute criminal offenses vested in the executive branch by Article II of the Constitution.

Furthermore, the sentences imposed on the defendants were excessive and should be overturned.

ARGUMENT

I. DUE PROCESS OF LAW IS VIOLATED BY THE APPOINTMENT OF AN INTERESTED PRIVATE ATTORNEY AS SPECIAL PROSECUTOR OF A SERIOUS CRIMINAL CONTEMPT WITH POWER TO CONDUCT AN UNDERCOVER "STING" OPERATION.

A. Due Process Requires A "Disinterested" Prosecutor.²²

A cornerstone of the criminal justice system in the United States is the public prosecutor. The public prosecutor's paramount responsibility is to seek justice. *Berger v. United States*, 295 U.S. 78, 88 (1935). It is appropriate for a public prosecutor convinced that a defendant's conviction is in the interest of justice to pursue it zealously. However, the prosecutor has only one legitimate interest—that of the public. The injection of other interests necessarily compromises the public interest

²² Judge Friendly suggested the use of the word "disinterested" to describe the situation where the prosecutor does *not* have an interest which constitutes "an additional and impermissible reason in forwarding the prosecution." *Wright v. United States*, 732 F.2d 1048, 1056 n.7 (2d Cir. 1984), cert. denied, 105 S.Ct. 779 (1985). It is, of course, beyond question that prosecutors have a right to seek conviction of those believed to be guilty. That, however, is not "additional" or "impermissible."

and impairs confidence in the fair and impartial enforcement of the law.

More than any other actor in the criminal justice system, the prosecutor has broad and essentially unreviewable discretion. The prosecutor has discretion to investigate, arrest, prosecute, plea bargain, confer formal and informal immunity, and make recommendations regarding bail and sentencing. Each of these areas has within it wide areas of responsibility providing significant opportunities for the exercise of discretion. Most of these duties are performed outside the courtroom, and are not subject to direct judicial supervision.

The participation of a disinterested, trained and accountable prosecutor provides assurance that the rights of the accused will be respected. "Almost all prosecutions of a serious nature in this country now involve a professional prosecutor. The absence of a trained prosecution official risks abuse or casual and unauthorized administrative practices and dispositions which are not consonant with our traditions of justice." ABA Standards Relating to the Prosecution Function, Standard 2.1, Commentary, p. 49 (Approved Draft 1971). When the "client" of the Special Prosecutor is the United States of America, undivided loyalty requires adherence to the principles upon which the criminal justice system is founded.

The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself.

Professional Responsibility: A Report of the Joint Conference, 44 A.B.A.J. 1159, 1218 (1958). See *Berger*, 295 U.S. at 88 (a prosecutor has the "twofold" aim of seeking justice and, for those he believes to be guilty, seeking conviction); See also *Polo*

Fashions v. Stock Buyers, 760 F.2d 698 (6th Cir.), petition for cert. filed 54 U.S.L.W. 3179 (1985).

The appointment of Vuitton's attorneys, who had vested interests not necessarily coincidental with those of the government, as Special Prosecutors deprived the defendants of a disinterested prosecutor in violation of their due process rights. Both Vuitton and Bainton, as its trademark counsel of long standing, have several direct, personal and pecuniary interests in obtaining convictions of those suspected of violating its trademark.

1. Federal cases.

Disinterestedness in the judicial process has been identified as a fundamental value by this Court. In a wide variety of situations the Court has held that the legal process must be free of partisan influences.²³ In *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980), this Court found that the regional administrator of the Employment Standards Administration of the Department of Labor had powers similar to that of a prosecutor, and was therefore held to a unique standard consistent with his position as public employee. Although the administrator determined violations and assessed fines which were returned to the agency for enforcement purposes, the Court held that the financial incentive to impose large and numerous fines was "too remote and insubstantial" to constitute a bias which violated due process. *Id.* at 243.²⁴ The administrator did

²³ *Tumey v. Ohio*, 273 U.S. 510 (1927) (judges); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (administrative boards); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole officers); *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (defense counsel). See also *Marshall v. Jerrico*, 446 U.S. 238 (1980) (standard to which administrative prosecutors are held) and *Berger v. United States*, 295 U.S. 78 (1935) (consequences of misconduct by prosecutor).

²⁴ For discussion of disinterested prosecutors and due process, see Note, *The Outmoded Concept of Private Prosecution*, 25 Am. U.L. Rev. 754 (1976); Note, *Private Prosecutors In Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 Fordham L. Rev. 1141 (1986); Kuhns, *Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury*, 73 Mich. L. Rev. 484 (1975).

not stand to benefit financially and the "interests" were entirely governmental.

Lower courts have directly addressed the problem of conflict of interest in prosecutors. In a Sixth Circuit case whose facts are similar to those of the case at bar, *Polo*, 760 F.2d 698 (6th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3179 (1985), the court recognized the serious implications of this dilemma for an attorney:²⁵

It is too much to expect an attorney committed to his client and the client's cause to recognize the "twofold aim" referred to in *Berger* when acting as prosecutor in proceedings which, if successful, can benefit immeasurably that client and his cause. We recognized that federal prosecutors occasionally overlook their twofold obligation and become too concerned with obtaining convictions. However, this overzealousness does not have its roots in a conflict of interest. When it manifests itself the courts deal with it on a case-by-case basis as an aberration. This is quite different from approving a practice which would permit the appointment of prosecutors whose undivided loyalty is pledged to a party interested only in a conviction.

Id. at 705.

Although *Polo* was decided on the basis of the supervisory power, other courts have used a similar analysis to hold that the appointment of an interested private prosecutor violates due process. In *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967), the

²⁵ The importance of the need for prosecutors to avoid conflict of interest and its appearance is reinforced by the Justice Department's standards for United States Attorneys. The United States Attorney's Manual cautions U.S. Attorneys and their assistants not to engage in any activity that "creates or appears to create a conflict of interest . . ." United States Attorney's Manual, Title 10-2.664 (1984). The manual even cautions attorneys about membership in bar groups, public commissions, and private business organizations because of the potential for an appearance of a conflict of interest. *Id.* at § 10-2.666.

Furthermore, the Manual in § 10-2.660 incorporates the Department of Justice Standards of Conduct, 28 C.F.R. § 45 (1984), which contains very broad restrictions on the permissible activities of employees, so as to avoid any conflict of interest or its appearance. 28 C.F.R. § 45.735-5 (1984).

Fourth Circuit held that a part-time prosecutor who prosecuted a man for assaulting his wife, while simultaneously representing the wife in a divorce action, was laboring under an impermissible conflict of interest which violated due process.

The Fifth Circuit reversed a criminal contempt conviction obtained by an interested private attorney in *Brotherhood of Locomotive Firemen and Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969), on due process grounds. The court said:

[T]here is no doubt concerning the genesis of this due process deficiency. It flows directly from the fact that the governance of the whole criminal contempt proceeding was delivered into the hands of counsel for private parties, not the National Sovereign. This transcends the matter of competence, character and professional trustworthiness. Indeed, it is the highest claim on the most noble advocate which causes the problem—fidelity, unquestioned, continuing fidelity to the client (footnote omitted). . . . The point is that those conflicting claims of undivided fidelity present subtle influences on the strongest and most noble of men. The system we prize cannot tolerate the unidentifiable influence of such appeals.²⁶

Brotherhood, 411 F.2d at 319.

In *United States ex rel. Miller v. Myers*, 253 F. Supp. 55 (E.D. Pa. 1966), the court refused to allow a conviction to stand because the defense attorney represented the defendant on a burglary charge and simultaneously, in another matter, the owner of the allegedly burgled establishment. In holding that

²⁶ In *United States v. McKenzie*, 735 F.2d 907 (5th Cir. 1984), *dismissing appeal from In re CBS, Inc.*, 570 F. Supp. 578 (E.D. La. 1983), the district court appointed disinterested private attorneys to prosecute a criminal contempt after the United States Attorney refused to prosecute. The district court then dismissed the criminal contempt. The Fifth Circuit dismissed the private prosecutors' appeal, holding that they did not represent the United States, and their role as representatives of the district court terminated when the district court dismissed the contempt proceeding. In view of its disposition of the case, the Fifth Circuit did not address the applicability of *Brotherhood. McKenzie*, 735 F.2d 907, 910 n.11 (5th Cir. 1984).

such a conflict violated the defendant's constitutional right to counsel, the court candidly stated that "[i]t takes no great understanding of human nature to realize that the individuals who had been burglarized might be less than happy and might go so far as to remove the attorney from their good graces if this defendant were acquitted." *Id.* at 57.²⁷

Similarly, it is not hard to imagine what might have happened to the relationship between Vuitton and Reboul, MacMurray had Bainton chosen anything other than to seek the harshest possible result. The point, of course, is that this possibility certainly must have occurred to Bainton when making decisions about the scope and direction of the investigation and prosecution.

2. State Cases.

State courts have also ruled that a prosecutor must be disinterested.²⁸ In *People v. Zimmer*, 51 N.Y.2d 390, 414 N.E.2d

²⁷ The ABA Code of Professional Responsibility has commented on the risk that judgment and loyalty will be compromised:

Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment of behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant.

ABA Code of Professional Responsibility EC 5-14 (1978).

²⁸ Although apparently not all states have addressed this question, only three states allow private attorneys to participate in a public prosecution without the consent or supervision of the district attorney: Alabama, *Hall v. State*, 411 So.2d 831 (Ala. Crim. App. 1981); Montana, *State v. Cockrell*, 131 Mont. 254, 309 P.2d 316 (1957); and Ohio, *State v. Ray*, 102 Ohio App. 395, 143 N.E.2d 484 (1956).

Twenty states allow participation *only* with the district attorney's permission and supervision: California, *People v. Powell*, 87 Cal. 348, 25 P. 481 (1891); Colorado, *Davis v. People*, 77 Colo. 546, 238 P. 25 (1925); Florida, *Ates v. State*, 141 Fla. 502, 194 So. 286 (1940); Georgia, *Allen v. State*, 150 Ga. App. 109, 257 S.E.2d 5 (1979); Illinois, *Hayner v. People*, 213 Ill. 142, 72 N.E. 792 (1904); Kansas, *State v. Berg*, 236 Kan. 562, 694 P.2d 427 (1985); Kentucky, *Stumbo v. Seabold*, 704 F.2d 910 (6th Cir. 1983); Louisiana, *State v. Hopper*, 251 La. 77, 203 So.2d 222 (1967); New Jersey, *State v. Wouters*, 71 N.J. Super.

705, 434 N.Y.S.2d 206 (1980), a conflict arose when a defendant was indicted for defrauding a corporation by a district attorney who was both counsel to and a stockholder in that corporation. The New York Court of Appeals held that the indictment should have been dismissed because the prosecutor's conflict violated ethical standards. The presence of a second client necessarily compromises the duty to pursue justice, even if only by appearance. The Nebraska Supreme Court has said:

The obligation of an attorney to his client, when once employed in a particular case or matter, can never be shaken off . . . With this obligation . . . it would be impossible for him to forget his sworn duty to his former client, and there would be a constant inclination to ask . . . "What effect will this evidence, or argument, have upon the rights of my first client, to whom I am still bound by every principle of law and honor? I should be faithful to my trust and protect [my client] in every way possible . . ." We are

479, 177 A.2d 299 (1962); New Mexico, *State v. Baca*, 101 N.M. 716, 688 P.2d 34 (1984); North Carolina, *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984); North Dakota, *State v. Kent*, 4 N.D. 577, 62 N.W. 631 (1895); Oklahoma, *Ryals v. State*, 434 P.2d 488 (Okla. Crim. App. 1967); South Carolina, *State v. Addis*, 257 S.C. 482, 186 S.E.2d 415 (1972); South Dakota, *State v. Basham*, 84 S.D. 250, 170 N.W.2d 238 (1969); Texas, *Ballard v. State*, 519 S.W.2d 426 (Tex. Crim. App. 1975); Utah, *People v. Tidwell*, 4 Utah 596, 12 P. 61 (1886); Virginia, *Cantrell v. Commonwealth*, 229 Va. 387, 329 S.E.2d 22 (1985); West Virginia, *State ex rel. Koppers Co. v. International Union of Oil, Chemical & Atomic Workers*, 298 S.E.2d 827 (W. Va. 1982); and Pennsylvania, *Commonwealth v. Musto*, 348 Pa. 300, 35 A.2d 307 (1944).

Six states do not allow more than minimal participation by private attorneys: Massachusetts, *Commonwealth v. Gibbs*, 70 Mass. (4 Gray) 146 (1855); Michigan, *Meister v. People*, 31 Mich. 99 (1875); Missouri, *State v. Harrington*, 534 S.W.2d 44 (Mo. 1976); Nebraska, *Flege v. State*, 93 Neb. 610, 142 N.W. 276 (1913); New York, *People v. Vlasto*, 78 Misc.2d 419, 355 N.Y.S.2d 983 (1974); and Wisconsin, *Biemel v. State*, 71 Wis. 444, 37 N.W. 244 (1888).

Four states have not stated the amount of assistance by a private prosecutor which is permissible: Indiana, *Smith v. State*, 426 N.E.2d 364 (Ind. 1981); Mississippi, *Goldsby v. State*, 240 Miss. 647, 123 So.2d 429 (1960), cert. denied, 365 U.S. 861 (1961); New Hampshire, *State v. Hale*, 85 N.H. 403, 160 A. 95 (1932); and Washington, *State v. Hoshor*, 26 Wash. 643, 67 P. 386 (1901).

For a summary of state law on this subject, see Note, *Private Prosecutors In Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 Fordham L. Rev. 1141 (1986).

forced to the conclusion that no honest and conscientious attorney could be able, nor should he, if he could, withstand such an appeal.

Flege v. State, 93 Neb. 610, 614, 142 N.W. 276, 278 (1913).

The Supreme Court of Wisconsin has also observed that a case is likely to be prosecuted unfairly "if the prosecution is permitted to be conducted by the paid attorneys of parties who from passion, prejudice, or even an honest belief in the guilt of the accused, are desirous of procuring his conviction." *Biemel v. State*, 71 Wis. 444, 446, 37 N.W. 244, 247 (1888). See also *Meister v. People*, 31 Mich. 99 (1875) (criminal prosecution should not be entrusted to those who may be tempted to use it for private ends); *State v. Kent*, 4 N.D. 577, 62 N.W. 631 (1895) (public control safeguards against overzealous prosecution by private persons).

These and other cases which prohibit participation by an interested prosecutor demonstrate that the duty a prosecutor owes to justice cannot be reconciled with concurrent representation of another client.²⁹

There is ample evidence in this case of direct, personal and pecuniary interests on the part of the Special Prosecutor arising out of his continuing role as advocate for Vuitton in contemporaneous civil proceedings, thereby compromising the crucial duty of undivided loyalty owed to the United States, his other "client." By virtue of his appointment as Special Prosecutor, Bainton had the benefit of various investigative privileges nor-

²⁹ There is another line of cases in which prosecutors have been compromised not by a second client but by a different additional and impermissible interest. In *Wright v. United States*, 732 F.2d 1048 (2d Cir. 1984), the Assistant United States Attorney whose only involvement was the grand jury presentation was married to a woman who had a long-running adversarial relationship with the person indicted. This was found to have created a conflict of roles which was the "additional and impermissible reason" compromising the prosecutor's duty to seek justice. See also *Midway Manufacturing Co. v. Kruckenberg*, 779 F.2d 624 (11th Cir. 1986), (partner in special prosecutor's law firm may have had business relationship with criminal contempt defendant) (remanded for hearing).

mally reserved for the Justice Department. He then proceeded to use this extraordinary investigative authority to pursue Vuitton's private interests. Although the court authorized surveillance activities to determine whether the injunction was being violated, the actual investigation ran as far afield as the merits of Klayminc's anticipated discharge in bankruptcy, the location of his assets and the defamation suit (J.A. 31, 34, 108). Indeed, the "government's" surveillance tapes were actually used by Bainton, months before the criminal trial, to promote Vuitton's pecuniary fortunes in the Florida bankruptcy proceedings.

Vuitton also had a strong monetary interest in obtaining a criminal conviction in this case because of the permanent injunction against defendant Young. If Young were convicted of violating this injunction, Vuitton would collect damages of \$750,000. It is therefore not surprising that the charges against him were pursued even though he had attempted to withdraw from the venture (R. 2284-85).

Another conflict of interest is demonstrated by Bainton and his law firm's status—throughout the relevant period—as defendants in a defamation action brought by Klaymine *before* the sting began (Pet. App. B-5). A conviction of Klaymine for criminal contempt certainly would have limited any possible recovery in the defamation action, which may have contributed to the suit's dismissal.

In addition to all of the foregoing there was a bitter relationship between Bainton, Vuitton and Klaymine and Young by virtue of extensive prior litigation. This demonstrates that Bainton's bias was toward particular individuals, thereby bringing this case within the scope of this Court's reservation in *Marshall*: "In particular, we need not say whether different considerations might be held to apply if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealousness in the enforcement process." *Marshall*, 446 U.S. at 250, n.12.

B. Prosecution Of A Serious Crime By An Interested Attorney Violates Due Process.

In a variety of contexts, the entitlement to constitutional rights varies directly with the severity of the consequences. Due process rights increase as the consequences to the individual of governmental action become more serious. *Baldwin v. N.Y.*, 399 U.S. 66 (1970) (trial by jury required for serious offenses); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel when defendant faces imprisonment); *see also* Speedy Trial Act § 101, 18 U.S.C. § 3172(2) (1985) (statutory right to speedy trial applies only to serious offenses).

This Court has held that a defendant charged with a serious criminal contempt, as are defendants here, is entitled to the utmost in procedural protections. *Bloom v. Illinois*, 391 U.S. 194 (1968) (right to jury trial in serious contempts). *Bloom* also held that when a defendant is convicted of criminal contempt, which has no maximum punishment, it is the sentence imposed which determines whether the offense is petty or serious. *Id.* at 211. Since defendants here were sentenced to significant prison terms, all were convicted of serious criminal contempts.³⁰

In *Polo Fashions*, 760 F.2d 698 (6th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3179 (1985) although it based its decision on supervisory power, the court stated that a disinterested prosecutor is one of the procedural protections which must be afforded to a defendant facing serious criminal punishment in a contempt action, relying on *Bloom v. Illinois*, 391 U.S. 194 (1968). *Polo*, 760 F.2d at 704. The defendant in *Musidor, B.V. v.*

³⁰ A criminal contempt is serious if the sentence is for more than six months. *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966). Petitioner Helfand was sentenced to six months, however the district court treated these offenses from beginning to end as serious criminal contempts. All defendants were tried together and provided with all the due process protections available to defendants charged with any serious crime, except the Sixth Amendment right to indictment by a grand jury (an issue which has not yet been decided by this Court), a statutorily proscribed maximum sentence, and, under the Second Circuit decision, a disinterested prosecutor.

Great American Screen, 658 F.2d 60 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982), the only modern authority for the appointment of an interested prosecutor, was sentenced to 60 days in prison. *Musidor*, 658 F.2d at 66.

1. The Criminal Justice System Is Founded On The Assumption That Prosecutors Are Disinterested.

In the United States, the requirement of fundamental fairness imposed by due process is maintained by a complex system of procedural and substantive rules enforced by, among others, trained and accountable public prosecutors.³¹ The system's rules, whether stemming from the Constitution, statutes or court decisions, have been developed implicitly or explicitly with confidence that the public prosecutor has only one client: the public interest. A ruling by this Court affirming the Second Circuit's decision would require reconsideration of the rules and procedures which have been developing for over two hundred years.

For example, in sharp contrast to civil practice, a prosecutor is obligated to provide defense counsel with exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). The determination before trial of what is material and exculpatory is necessarily left to the prosecutor and courts rely on public prosecutors to exercise their broad discretion responsibly. A departure from the presumption that the prosecutor acts with no motives but those consistent with the duty to seek justice could require either that the judge examine the documents prior to trial, clearly a burdensome task, or that the prosecutor produce every piece of evidence whether exculpatory or not. Confidence that the prosecutor will exercise judgment responsibly is not possible when there is the presence of a client's interest in addition to that of doing justice. See also *United*

³¹ The choice was made very early in our history to abandon the English system of private prosecution as a reaction to problems of harassment, bribery and collusion. Note, *The Outmoded Concept of Private Prosecution*, 25 Am. U.L. Rev. 754 (1976).

States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (prosecutor has discretion to determine whether illegal aliens may be deported or must be kept in United States to testify at trial).

2. Alternatives Exist To Prosecution By An Interested Private Attorney.

There are other less objectionable alternatives to appointing an interested private attorney to prosecute a criminal contempt. First, criminal contempts may be referred to the United States Attorney's Office. If the case involved, as alleged here, a "massive international conspiracy" (J.A. 25), it is unlikely that the government would decline to prosecute.³² If there were a shortage of assistants, the U.S. Attorney could appoint a disinterested private attorney to prosecute the case, as is authorized by 28 C.F.R. § 45.735-3(c) and 28 U.S.C. § 543, and recommended by ABA Standards Relating To The Prosecution Function; Standard 2.4 (Approved Draft 1971).

In any event, the United States Attorney was never asked to assume responsibility for this case (R. 1801). At most, the record shows that the United States Attorney did not, of his own initiative, choose to intervene in what was essentially a *fait accompli* between a federal judge and a private party. There is a world of difference between "refusing" to prosecute because of low priority or limited resources and declining to supplant the efforts of a well-heeled party who has already invested substantial resources and obtained a special judicial appointment. While the record contains no explanation of Vuitton's

³² "In the great majority of [criminal contempt] cases, the dedication of the executive branch to the preservation of respect for judicial authority makes the acceptance of the court's request to prosecute a mere formality." United States Attorney's Manual, Title 9-39.318 (1977).

In addition, the law has changed since the permanent injunction in this case was entered, such that a criminal contempt action would not be necessary to impose criminal sanctions on trademark infringers. The Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, §§ 1501-1503, 98 Stat. 2178 (codified at 15 U.S.C.A. §§ 1116-1118, 18 U.S.C.A. § 2320 (West Supp. 1985)), makes trafficking in counterfeit goods a federal crime.

failure to initially request the assistance of the Justice Department, whose prosecuting attorneys are "charged with wider responsibilities" than are retained counsel, *United States ex rel. Vuitton et Fils. S.A. v. McNally*, 519 F. Supp. 185, 186 (E.D.N.Y. 1981), there is every reason to believe that the United States Attorney would have taken a far different approach to the case than was taken by the Vuitton attorneys. See Remarks of Rudolph Giuliani, United States Attorney, Southern District of New York, on "60 Minutes," Vol. XVII, No. 6 (CBS News) (broadcast Oct. 21, 1984) (R. 149.)

Finally, even if the public prosecutor were to prove unequal to the task of prosecuting serious criminal contempt charges, it does not follow from Rule 42(b) that a court must select the alternative which most gravely interferes with the defendant's right to a disinterested prosecutor. The *Polo* court suggested the appointment of a disinterested private attorney. *Polo*, 760 F.2d at 705. The appointment of *pro bono* counsel from established law firms, *see e.g.* United States District Court, S.D.N.Y., *Procedures Regarding Appointment Of Attorneys In "Pro Se" Civil Actions* (Sept. 21, 1983) (R. 419), would be both practical and consistent with the public interest objectives of *pro bono* service. After all, the interests to be vindicated are not Vuitton's, but those of the court and the public. Such counsel would exercise judgment on behalf of the court, free from the compromising influences of private interests, and prevent any appearance of impropriety.

C. An Interested Private Attorney Appointed As Special Prosecutor Should Not Be Given The Power To Conduct A "Sting" Operation.

1. A Private Attorney Appointed To Conduct A Sting Operation Lacks The Training And Accountability To Run Such A Complicated And Controversial Investigation.

The Second Circuit approved a sting operation conducted by an attorney who is untrained and inexperienced as a criminal investigator and accountable to no one but his own conscience

and his private client who foots the bill. The special prosecutor in this case had no experience or training in the conduct of complex and controversial "sting" operations. This controversial investigative technique is subject to close supervision according to strict guidelines even when engaged in by Justice Department investigators. See Attorney General's Guidelines on FBI Undercover Operations, (January 5, 1981) (R. 399). In the wake of ABSCAM, the Justice Department's internal safeguards have been described as critical to ensure the reliability of evidence developed through "sting" investigations. *FBI OVERSIGHT: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 138-41 (1980) (statement of Phillip B. Heymann, Asst. Atty. General, Criminal Division, Department of Justice). See also ABA Standards Relating to the Prosecution Function, Standards 2.3-2.6, Commentary (Approved Draft 1971) (importance of training for prosecutors). The Special Prosecutor's investigation operated without the benefit of internal or external controls.

Even if an interested private attorney may be appointed as special prosecutor, he should not be given the power to conduct "sting" operations for two reasons. First, the conduct of a complex "sting" operation requires well-trained and accountable investigators, which Weinberg and Bainton certainly were not. Second, the granting of broad investigatory powers to an individual who represents both a private client and the government exerts a strain on the principle of confidentiality which governs the conduct of a criminal investigation.³³

Beyond warnings "not to entrap anyone" and not to "embarrass the government," Weinberg was given no instructions concerning the methodology of the investigation (R. 2167).

³³ The Special Prosecutor's actions make tangible the concern that "misuse [of government investigatory powers] would unfairly harass citizens, give unfair advantage to the lawyer's private practice clients and law firm, and impair public willingness to accept the legitimate use of those powers." C. Wolfram, *Modern Legal Ethics* 460 (1986).

Furthermore, a public prosecutor is responsible to the judge insofar as conduct within the courtroom is concerned, but he is also accountable to superiors within the United States Attorney's office and the Justice Department. Bainton, having been appointed by a judge, was obviously not part of such a hierarchy and thus, with respect to conduct outside of court, accountable to no one. The importance of this hierarchical structure to the fair enforcement of the law is demonstrated by the oversight procedures established by the United States Attorney's Manual.

Judge Oakes summed up the risks when he said:

Those attorneys will frequently lack knowledge of all the limits that our laws require prosecutors to observe. Through inclination and ignorance, as well as lack of responsibility to the public, to higher authorities or to an electorate, or a combination of these, private attorneys are likely to fail to exhibit the self-restraint in conducting an investigation and the candor in admitting errors that are required of prosecutors and are of critical importance if our system is to work properly.

(Pet. App. A-22).

He therefore concluded that a sting should not be approved unless there is no other way of proving the violation of the court order and the proof is strong that the violation has already begun (Pet App. A-17).

D. Reversal Of A Criminal Conviction is Required When A Prosecutor Possesses An Actual Conflict Of Interest.

A prosecutor should be disqualified from any action in which there is an actual conflict of interest. The potential for injustice which arises when there is an interested prosecutor is similar to that which results when a judge has a conflict of interest. Even though the prosecutor may claim that other interests have not affected the performance of his or her duties, the appearance of a conflict requires disqualification of a prosecutor because of the negative effect on the public's perception of the integrity of the criminal justice system.

The role of judge and the prosecutor have certain common elements. At a minimum they share the goal of achieving justice. This common goal is revealed in the process that a case goes through from start to finish. Once the trial begins, however, the duty to determine the fate of the defendant passes to the judge. In that forum, it is the prosecutor's duty to act as an advocate. The common goal which judges and prosecutors share justifies using the same standard for prosecutors that has always been applied to judges.

Disqualification of a judge is required when there is a "direct, personal, substantial, pecuniary interest in the matter before the court. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). A judge is not permitted "to try cases in which he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). Although the particular level or type of interest has not been defined with precision, there is no requirement of proof that the interest actually altered the judge's decision. *Id.* at 136. Rather, the focus is on the character of the interest, and the "possible temptation" which could lead the judge "not to hold the balance nice, clear and true between the State and the accused." *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

In addition to concern about the public's perception of and confidence in the justice system, the primary reason for this strict standard is the practical impossibility of proving that the interest caused or contributed to the result. "[T]he practical impossibility of establishing that [a prosecutorial conflict of interest] has worked to the defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice." *Wright*, 732 F.2d 1048, 1056 (2d Cir. 1984), cert. denied, 105 S.Ct. 779 (1985) (quoting *People v. Zimmer*, 51 N.Y.2d 390, 395, 414 N.E.2d 705, 707, 434 N.Y.S.2d 206, 208 (1980)); see also *People v. McDonald*, 196 N.Y.L.J. 13, July 18, 1986 at 1, col. 6 (N.Y. Ct. App., July 3, 1986). In state cases in which the public prosecutor has been forbidden from participating in a civil trial because of a pending criminal action, the courts have not looked for proof of preju-

dice, but instead have said that they must avoid even the possibility of prejudice or appearance of a conflict. See e.g., *State v. Burns*, 322 S.W.2d 736 (Mo. 1959); *State v. Jensen*, 178 Iowa 1098, 160 N.W. 832 (1917).

It is neither desirable nor practical to intrude into a judge's decision making process. Similarly, the nature of certain prosecutorial decisions make them quasi-judicial in part because they are not reviewable by any court. The public prosecutor exercises the power to decide whether, how and who to investigate, who to charge and with what, and whether to plea bargain or immunize. These decisions are all as a practical matter beyond the review of a judge. It is impossible to determine how any outside interests have influenced the prosecutor's discretion, much less whether the defendant has been prejudiced in any way. The exercise of the discretionary functions of the prosecutor will normally influence, however subtly, the creation or selection of facts. This is particularly true of stings and is amply demonstrated here. As a result, the way in which improper interests impacted can never be measured. Furthermore, in order to maintain the integrity of the system, "justice must satisfy the appearance of justice." *Murchison*, 349 U.S. at 136.

1. Defendants Have Suffered Actual Prejudice.

However, even if the existence of a conflict of interest or the appearance of such a conflict in the prosecutor is not enough to require reversal, this conviction should be reversed because defendants have suffered actual prejudice by the violation of their due process rights. This can be seen through an examination of the transcripts of conversations which were a result of the "sting" operation.

First, the unreliability of the evidence gathered was prejudicial to defendants. Ambiguity in evidence is one element of due process violations prejudicial to the defendant. *United States v. Myers*, 527 F. Supp. 1206, 1229-30 (E.D.N.Y. 1981).

Ambiguities in the transcript may mislead the fact-finder.³⁴ Ambiguity was one significant risk peculiar to sting operations cited by *FBI UNDERCOVER OPERATIONS: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong. 2d Sess. 39-124 (1982). Weinberg on numerous occasions led the defendants to believe that their conduct would not violate the injunction (J.A. 52, 59, 65, 70, 72, 74, 75, 90, 91, 97, 98).

Second, a question which has persisted throughout this case is the extent to which the defendants were persuaded or encouraged by agents of the "government" to do what they might otherwise not have done (R. 288, 314, 769). Contrary to what Vuitton's attorneys had the court believe when the application was made for appointment as special prosecutor, no acts in violation were committed or contemplated prior to Weinberg's contact with the Klaymines. The "massive international conspiracy" (J.A. 25) turned out to be an inchoate plan to purchase a factory in Haiti, for which the Klaymines lacked any of the necessary materials or capital without the promised support of Weinberg. Even if there were a conspiracy to produce such bags, the injunction by its terms did not prohibit conspiracy to sell or manufacture Vuitton bags (Pet. App. D-1), and only twenty-five such bags were delivered three days after the sting began. "My reading of the record indicates . . . that the defendants here had probably not violated the earlier order . . . and the investigation may have been the proximate cause of the violation." (Pet. App. A-23.) (Oakes, J., dissenting). It is highly doubtful that any violation would have taken place had it not been for Vuitton's and Bainton's extraordinary efforts to put the defendants in prison.

³⁴ Defendants' motion for a post-trial hearing on due process issues pursuant to *United States v. Myers*, 527 F. Supp. 1206 (E.D.N.Y. 1981) was denied.

2. Confidential Information Obtained In A Criminal Investigation May Not Be Used As Evidence In A Civil Action.

It is well-settled that a civil litigant—even the Justice Department's Civil Division—cannot enlist the aid of a government criminal investigation to develop evidence helpful to the prosecution of its civil claims. *See United States v. Sells Engineering*, 463 U.S. 418 (1983); *see also* Fed. R. Crim. P. 6. Such restrictions have been imposed because

[g]overnment lawyers and law offices have available a terrible array of coercive methods to obtain information—grand jury, police investigation and interrogation, warrants, informers, and agents whose activities are immunized, authorized, wiretapping, civil investigatory demands, enhanced subpoena power, and the rest.

Wolfram, p. 460.

Civil litigants are not entitled to the fruits of some types of government investigations through ordinary channels of civil discovery. *See, e.g., In re United States*, 565 F.2d 19, 22-23 (2d Cir. 1977), cert. denied *sub nom. Bell v. Socialist Workers Party*, 436 U.S. 962 (1978) (government informer's privilege); *Frankel v. SEC*, 460 F.2d 813, 817-18 (2d Cir. 1972) cert. denied, 409 U.S. 889 (1972) (investigatory files privilege). Indeed, the risk of informal disclosure of such information requires the disqualification of former government attorneys who seek to represent parties in matters related to their official responsibilities. *See General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974). Cf. *Model Code of Professional Responsibility*, DR 9-101(B) (1979).

Bainton admitted in his affidavit seeking to be appointed special prosecutor that the methods of investigation that he proposed were ethically off limits to ordinary lawyers. (J.A. 26). *See ABA Commission on Ethics and Professional Responsibility*, Formal Op. 337 (1974). Despite his knowledge of the unique grant of authority permitting him to record con-

versations, he could not resist using them in the Florida action in his capacity as Vuitton's attorney before the criminal contempt trial.

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO PROHIBIT THE APPOINTMENT OF AN INTERESTED PRIVATE ATTORNEY AS A SPECIAL PROSECUTOR.

The use of the supervisory power is uniquely appropriate because the offense of criminal contempt shares with the supervisory power the purpose of preserving the integrity and dignity of the court. As Judge Oakes said in his dissenting opinion, "Respect for the court, the end goal of contempt, may be diminished when a court approves an open-ended investigation by attorneys unrestrained by either institutional guidelines or the court's own specific guidance." (Pet. App. A-21.) (Oakes, J., dissenting).

This Court has endorsed the use of supervisory power to deal with conflicts of interest, *Cuyler v. Sullivan*, 446 U.S. 335, 346 n.10 (1980), and the Sixth Circuit applied the supervisory power to the problem of private attorneys acting as public prosecutors. See *Polo Fashions, Inc. v. Stock Buyers Int'l, Inc.*, 760 F.2d 698, 704 (6th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3179 (1985). It is therefore appropriate that the supervisory power be used to provide at least a modicum of judicial control over investigative and prosecutorial abuses. "Authorizing the nearly-outrageous and barely legal can hardly be said in the long run to preserve the dignity of the courts or secure their position of respect." Pet. App. A-23 (Oakes, J., dissenting).

III. NEITHER THE TERMS NOR THE HISTORY OF FED. R. CRIM. P. 42(b) AUTHORIZE THE PROSECUTION OR INVESTIGATION OF A CRIMINAL CONTEMPT BY A PRIVATE ATTORNEY.

A. Reliance On Rule 42(b) To Support Appointment Of Civil Plaintiff's Counsel To Prosecute Criminal Contempt Is Unwarranted.

The Second Circuit relied on Fed. R. Crim. P. 42(b) to authorize the practice of appointing an interested private

attorney to prosecute a criminal contempt. Rule 42(b) simply sets out the procedural framework for criminal contempts not committed in the court's presence. Nothing in the text of the rule indicates that the person who gives notice is also permitted to prosecute.³⁵ Furthermore such an interpretation would permit the judge to give notice, prosecute, be the judge of the law and fact-finder, in the absence of a jury trial. Although wearing so many hats is permitted under very limited circumstances, see Rule 42(a), *Taylor v. Hayes*, 418 U.S. 488 (1974); *United States v. Lumumba*, 741 F.2d 12, 16 (2d Cir. 1984) and for very special reasons, see Dorsen & Friedman, *Disorder in the Court* (1973); permitting it for indirect contempts would clearly violate our most fundamental notions of fairness.

The Notes of the Advisory Committee on the Rules confirm this interpretation:

The requirement in the second sentence that the notice describe the criminal contempt as such is intended to obviate the frequent confusion between criminal and civil contempt proceedings and follows the suggestion made in *McCann v. New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935).

Fed. R. Crim. P. 42(b) advisory committee's note.

In *United States v. United Mine Workers of America*, 330 U.S. 258 (1946) this court found that Rule 42(b) "was designed to insure a realization by contemnors that a prosecution for criminal contempt is contemplated." *Id.* at 298, and that "[t]he rule in this respect follows the suggestion made in *McCann*." *Id.* at 298 n.66.

³⁵ The first sentence of Rule 42(b) provides that a criminal contempt "shall be prosecuted on notice." The second sentence specifies the content of the notice, and the third details how the notice shall be given. Notice is provided in one of three ways: (1) orally by the judge in open court, in the presence of the defendant; (2) by an order to show cause; or (3) by an order of arrest. The latter two provisions may be brought to bear upon application of either the United States Attorney or a court appointed attorney.

Since the advisory committee relied on *McCann* and the Second Circuit's erroneous interpretation of Rule 42(b) is based on *McCann*, a brief examination of *McCann* and the law of contempt at the time of *McCann* is necessary.

B. Notions Of Contempt Have Undergone Dramatic Changes In The Last 50 Years Thus Rendering McCann Inapplicable.

In the early twentieth century, contempt was thought to be *sui generis*, i.e., neither civil nor criminal, but containing elements of both. *Meyers v. United States*, 264 U.S. 95 (1924). As a result, courts struggled to articulate the difference between the two and the procedures applicable to each.

This process was not without confusion, much of it in fact caused by *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 417 (1911), which held that the way to distinguish between civil and criminal contempt was to examine the character of the proceeding and the purpose of the result. *Id.* at 441. In terms of the proceeding's character, no single detail was said to be controlling, and if the purpose of the sanction was to vindicate the authority of the court, it was punitive and therefore criminal; if the purpose was "remedial, oriented toward coercing the defendant to do what he had refused to do" it was civil contempt. *Id.* at 441-42.

In addition to requiring a complex analysis of several factors, this test had the disadvantage of being backward-looking. The characterization of the proceeding depended heavily on the purpose of the sanction which, of course, could not be known until the end of the case. Additional problems occurred because once the sanction was determined to be criminal, rudimentary due process required that notice of the criminal nature of the action be given clearly and up front.³⁶ Since notice of an action's

³⁶ This was particularly important because many contempts at that time arose out of civil actions. See generally, C. Thomas, *Problems of Contempt of Court* (1934).

character could, theoretically, be given simply and clearly at the outset, to do so was preferable to the *Gompers* test. Proof of notice that the contempt was criminal began to be the critical element.

Unfortunately, the ease and simplicity of the concept proved surprisingly difficult to apply. In *In re Kahn*, 204 F. 581 (2d Cir. 1913), the Second Circuit held that the affiliation of the plaintiff's attorney would give sufficient notice to the defendant of whether the contempt was civil or criminal. In 1935, Judge Learned Hand rejected the *Kahn* test despite recognizing its simplicity because he could not reconcile it with *Gompers*, which required consideration of several factors. *In re Guzzardi*, 74 F.2d 621 (2d Cir. 1935). Less than eleven months later, Judge Hand rejected *Guzzardi* in *McCann* and adopted a notice procedure which became the basis of Rule 42(b). See Note, *Civil and Criminal Contempt of Court*, 46 Yale L.J. 326 (1936).

Additional considerations argue against the application of *McCann* to support the appointment of private attorneys as special prosecutors. The present-day understanding of criminal contempts differs significantly from the understanding of contempts that was prevalent in the early twentieth century. Moreover, the Supreme Court in the fifty years following *McCann* has extended important constitutional protections to criminal contempt defendants. As a result of these changes, reliance upon *McCann* for anything beyond a procedure for providing notice is incorrect.

The law of criminal contempt has undergone several fundamental changes since the era in which *McCann* was decided. As noted, during most of the Constitution's history, criminal contempt was regarded as *sui generis*; it was neither a civil nor criminal proceeding. *Meyers*, 264 U.S. at 104-5. Not until 1968 was it established definitively that "criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punished by fine or imprisonment or both." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968).

The notion of the court's power to summarily punish contempt refers to a special type of proceeding where the judge assumes the roles of accuser, prosecutor, jury, and judge to determine whether a violation of the court's authority has occurred. At the time of *McCann* courts enjoyed broad powers to punish summarily both out of court as well as in court contempt where such conduct had the "direct tendency to prevent and obstruct the discharge of judicial duty." *Toledo Newspaper v. United States*, 247 U.S. 402 (1918)³⁷; see also *Craig v. Hecht*, 263 U.S. 255 (1923) (published letter criticizing a district court judge found to be contemptuous). *McCann* itself recognized that courts possessed broad powers to punish summarily both indirect and direct criminal contempts. *McCann*, 80 F.2d at 213. Furthermore, *McCann*'s discussion of notice and the power to appoint attorneys assumes the court's broad power to punish summarily direct and indirect criminal contempts existing at that time. *Id.* at 214.

In the case of indirect criminal contempts the only barrier preventing the court from immediately adjudging the defendant's guilt was the contemnor's right to notice and an opportunity to be heard.³⁸ In sum, the suggestion in *McCann* that courts could appoint private interested parties as special prosecutors came at a time when it was thought that a court's power was so broad that there was no need for a prosecutor as that role is understood today.

³⁷ *Toledo* interpreted the scope of Judicial Code§ 268, 36 Stat. 1163 (1831), which empowered courts to punish contempts. The court stated that the statute "conferred no power not already granted and imposed no limitations not already existing . . . it served but to plainly mark the boundaries of the existing authority resulting from and controlled by the grants which the constitution made and the limitations it imposed." *Toledo*, 247 U.S. at 418. At the time of *McCann*, the statute was codified as 28 U.S.C. § 285. The *Toledo* interpretation was overruled in 1941 prior to the adoption of the present contempt statute, 18 U.S.C. § 401 and Fed. R. Crim. P. 42(a). *Nye v. United States*, 313 U.S. 33 (1941).

³⁸ Significantly, although the Fifth Amendment's right against self-incrimination applied to criminal contempts, the combination of the courts' summary power and the absence of the rights to counsel and trial by jury in effect required the defendant to answer.

In the 50 years following *McCann*, the application of constitutional protections to criminal contempt proceedings and the rejection of the *Toledo Newspaper* decision have significantly limited the court's power to punish summarily indirect criminal contempt. Twelve years after *McCann* this Court recognized that the alleged contemnor is entitled to a public trial. *In re Oliver*, 333 U.S. 247 (1948). The right to an impartial tribunal also was extended to criminal contempts. *Offutt v. United States*, 348 U.S. 11 (1954); *In re Murchison*, 349 U.S. 133 (1955). The right to counsel was extended to indigent criminal defendants in *Gideon v. Wainwright*, 372 U.S. 335 (1964), and in 1968 this Court ruled that the Sixth Amendment right to trial by jury applied to defendants in non-petty criminal contempt proceedings. *Bloom*, 391 U.S. 194 (1968).

Also, the scope of the statute authorizing criminal contempt proceedings has been greatly restricted following *McCann*. The broad interpretation presented in *Toledo Newspaper* was discarded in *Nye v. United States*, 313 U.S. 33, 47-52 (1941) which narrowly limited the conduct proscribed to "misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business." *Id.* at 52. *Nye* rejected the broad conception of summary contempt power upon which the *McCann* appointment language was based. Indeed, the dissent in *Nye* stated that the majority's decision in effect overturned a line of cases, one of which was *McCann*. *Id.* at 55 (Stone, J., dissenting). The same year witnessed the application of the First Amendment to bar punishment for a broad category of out-of-court conduct. *Bridges v. California*, 314 U.S. 252 (1941). Lastly, it should be noted that the theoretical underpinning of a court's power to summarily punish indirect criminal contempt has been questioned.³⁹

³⁹ The belief that courts had broad powers to summarily punish contempt was based on, first, a long standing common law practice in England and, second, on the necessary power inherent in courts to enforce their orders and protect their dignity. *In re Debs*, 158 U.S. 564, 595 (1894); 4 Blackstone Commentaries, 283-88. The first so-called justification was disproven by

C. Fed. R. Crim. P. 42(b) Does Not Permit The Appointment Of Private Interested Parties To Exercise The Investigatory Power Of The United States Attorney

There is a vast difference between allowing an attorney to notify the court of a violation and empowering an attorney to wield a government prosecutor's investigatory powers. The Second Circuit was mistaken in stating that Rule 42(b) uses the term "to prosecute" (Pet. App. A-12), and also in error in deriving therefrom the authority to grant private attorneys investigative powers. The Second Circuit's other grounds for giving its approval for such a practice do not indicate the source of this power except by a negative inference. Relying on defendants' "failure to cite any cases in which Rule 42 has been construed to limit the [investigatory] powers of the special prosecutor," the court held that "[t]he special prosecutor should have the same power to gather evidence and present that evidence as does any other government prosecutor" (Pet. App. A-11).

The Second Circuit's decision was incorrect, for it would permit *any* attorney to prosecute a criminal contempt proceeding related to *any* court order, and to exercise the full investigatory powers of the Executive Branch. Thus, special

several commentators. J. Fox, *The History of Contempt of Court*, (1927). Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1042-1052 (1924); C. Thomas, *Problems of Contempt of Court, A Study of Law and Public Policy*, 4-11 (1934). Fox established that Blackstone's statement that summary proceedings were based on "immemorial usage" lacked historical foundation. Rather, only the infamous Star Chamber exercised summary process, and it was not until the mid-to late seventeenth century that other English courts, without proper legal precedent, began to claim the power to summarily punish contempt. The second justification put forth in *Debs* was limited to non-petty criminal contempts in *Bloom*, 391 U.S. 194. The absence of the full complement of procedural protections in contempt prosecutions could not "be squared with the Constitution or justified by considerations of efficiency or the desirability of vindicating the authority of the court." *Id.* at 208.

prosecutors could convene grand juries,⁴⁰ subpoena witnesses and documents to the grand jury, apply for and execute search, arrest and wiretap warrants, and enter formal and informal plea and immunity agreements.⁴¹ Such far reaching consequences were neither foreseen nor intended by the drafters of Rule 42(b).

This easy transition from appointing a special prosecutor to appointing a special investigator would have to be resisted even if Rule 42(b) actually did grant courts the power to make special prosecutors out of private attorneys. The private attorney who is empowered to conduct the prosecutorial side of court proceedings when in the presence of the court is at least subject to its supervision. The private attorney armed with the resources of law enforcement is a far less controllable creature. The result of such a lack of effective oversight is well demonstrated in this case in which, as Circuit Judge Oakes pointed out, the investigation may have caused the violation. (Pet. App. A-23) (Oakes, J., dissenting)

Finally, since Rule 42(b) does not authorize the appointment of private attorneys to prosecute criminal contempts, then *a fortiori* it does not support the Second Circuit's approval of the District Court's decision to bestow full investigatory powers upon such private attorneys.

⁴⁰ Criminal contempts can be prosecuted by indictment. *United States v. Mensik*, 440 F.2d 1232, 1234 (4th Cir. 1971).

⁴¹ Given the Second Circuit's broad construction of a special prosecutor's powers and the claim by Bainton that a "massive international conspiracy" was the target of the investigation, it does not take a very fertile imagination to picture how an untrained special prosecutor could compromise the United States Attorney's prerogatives to prosecute and enter into plea agreements. See Letters to O'Neil dated September 10 and September 11, 1984 (L. 36, 39). In fact, Bainton as Special Prosecutor purported to "bind[. . .] the Government" by granting immunity to Rochman for criminal contempts resulting from all known or unknown violations of Vuitton's trademark rights (J.A. 105) despite the obvious fact that his appointment extended only to the specific allegations contained in the application to be appointed Special Prosecutor approved by the court.

D. Rule 42(b) Cannot—Consistent With The Constitutional Doctrine Of Separation Of Powers—Be Interpreted To Permit Appointment Of An Interested Private Attorney To Prosecute A Criminal Contempt.

This Court recently noted that the Constitution mandates a tripartite division of the Federal Government's powers. *INS v. Chadha*, 462 U.S. 919, 951 (1983); *Bowsher v. Synar*, 106 S.Ct. 3181 (1986). The framers intended the three branches of government to be "largely separate from one another." *Buckley v. Valeo*, 424 U.S. 1,120 (1976). Separation of powers rises to the level of constitutional importance because it operates as a vital check against tyranny. *Buckley*, 424 U.S. at 121. However, the concept is not inflexible. The Constitution did not create three watertight compartments, *Buckley* at 121, because the "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a nation capable of governing itself effectively." *Id.* at 121. In the words of Justice Jackson, the Constitution "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 625 (1952) (Jackson, J., concurring). This Court has recommended a "pragmatic, flexible approach" to the resolution of disputes among the branches. *Nixon v. Administrator of General Services*, 433 U.S. 425, 442 (1977).

The Constitution vests the power to prosecute criminal offenses in the Executive Branch, by reserving the executive power to the President, Article II, section 1, and by imposing on the President the duty to "take care that the laws be faithfully executed." Article II, section 3. This Court has said that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing *Confiscation Cases*, 74 U.S. (7 Wall) 454 (1869)). The Fifth Circuit viewed judicial interference with discretionary power to prosecute as violative of separation of powers, *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965), and

concluded that the judiciary is without the power to compel the prosecution of any criminal offense. *Smith v. United States*, 375 F.2d 243 (5th Cir. 1967).

Article III, section 2 carefully circumscribes the judicial power by providing for federal courts of limited jurisdiction. The Constitution creates a Supreme Court but leaves the creation of the inferior courts to the discretion of Congress, Article III, section 1. James Madison explained why the judicial power needed to be carefully controlled:

Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.

The Federalist No. 47 (J. Madison) (*quoted in Buckley*, 424 U.S. at 120 (emphasis in original)). Furthermore, Madison strongly advocated a system of checks and balances in the form of divided offices and functions to assure that "each [branch] may be a check on the other." Federalist No. 51 (*quoted in Buckley*, 424 U.S. at 123.)

Contempt is an area of the law in which a court yields enormous power and in which legislative participation is minimal. 18 U.S.C. §401 demonstrates this minimal involvement, for it does not specify what conduct constitutes contempt. Rather, it empowers a court to punish "disobedience or resistance to its lawful writ, process, order, rule, decree, or command". 18 U.S.C. §401 (3) (1982). Madison's warning regarding an unbridled judiciary and the absence of checks and balances is borne out by the history of this case. Here, Bainton drafted the injunction which, after its approval by the court, became the equivalent of a statute against which defendants' conduct was measured. There was no participation by the executive or the legislature as a practical matter.

The absence of participation by the executive and legislature violates the principle of separation of powers by assuming

powers reserved for co-equal departments.⁴² In sum, the law has been judicially created, investigated and prosecuted almost totally within the judicial branch.⁴³

⁴² Congress has empowered the judiciary to appoint counsel to prosecute crimes in the Ethics in Government Act, 28 U.S.C. § 591 et seq. (1982). It mandates a procedure for the investigation and prosecution of a designated class of Federal officials. The Attorney General is directed to apply to the court to appoint independent counsel whenever he determines that investigation "by the Attorney General or other officer of the Department of Justice may result in a personal, financial or political conflict of interest." 28 U.S.C. § 591(c). The Act is consistent with the "flexible" notion of separation of powers expressed in *Buckley*, 424 U.S. at 121, because when a conflict of interest arises within the executive department it can turn to a co-equal department. The Act permits the judiciary to step in and temporarily exercise certain executive powers until the emergency is resolved.

28 U.S.C. § 546 permits court appointment of a temporary United States attorney when that office becomes vacant. This provision has been held not to violate the separation of powers doctrine. *United States v. Solomon*, 216 F. Supp. 835, 840 (S.D.N.Y. 1963). Research has not revealed the precise rationale for this provision. However, it was enacted in its original form in 1863, 12 Stat. 768 (1863), and it reflected a pragmatic response to the communication problems of the era. The temporary appointment of a prosecuting attorney by the local court would avoid a total stoppage of the court's work, which would result if the court needed to await a new presidential appointee. This hypothesis is supported by the original provision's inclusion in an omnibus act entitled "An Act to Give Greater Efficiency to the Judicial System of the United States." Furthermore, it was quickly established that the authority vested in the courts to fill temporarily the vacancy lasted only until the President acted, and no longer. *In re Farrow and Bigby*, 3 F. 112, (Ga. 1880); see also *In re Yancey*, 28 F. 45 (C.C. Tenn. 1886).

⁴³ It could be argued that the notion of a court which does not have the power to determine for itself when to cite for contempt is itself antithetical to the separation of powers in that it would be unconstitutional for the judiciary to have to rely on the executive's whim in order to function. Although the notion is valid with respect to direct contempts, Fed. R. Crim. P. 42(a), where the conduct is so disruptive as to prevent the actual functioning of the court, it is not valid with respect to indirect contempts. In indirect contempts the court's interest is the same as in any other criminal case. *United States v. Shipp*, 203 U.S. 563, 574 (1906). (Indirect contempts do not prevent the actual functioning of the court) (Holmes, J.). See Note, *The Story of a Notion in the Law of Criminal Contempt*, 41 Harv. L. Rev. 51 (1927). Kuhns, *Limiting the Criminal Contempt Power: New Roles for the Prosecutor and the Grand Jury*, 73 Mich. L. Rev. 483 (1975).

IV. THE SENTENCES IMPOSED ON THE PETITIONERS WERE EXCESSIVE, BASED ON IMPROPER CONSIDERATIONS, AND DISPROPORTIONATE.

Courts have a special duty to exercise the contempt power with responsibility and circumspection, particularly since Congress has not seen fit to impose limitations on sentence. *Green v. United States*, 356 U.S. 165, 188 (1958). See also *United States v. Gracia*, 755 F.2d 984, 988-89 (2d Cir. 1985). It is also well settled that federal appellate courts have the power "to revise sentences in contempt cases." *Cheff v. Schnackenberg*, 384 U.S. 373, 382 (1966); see also *Gracia*, 755 F.2d 984. More importantly "[p]unishment of criminal contempt should reflect the least possible power adequate to the end proposed," *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230-31 (1821).

In criminal contempt cases, courts should consider the interest of the public in having judicial decrees obeyed. See *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911). The district court erred in basing defendants' sentences primarily on "the rights of trademark holders," thus vindicating private interests (R. 240). The central question should have been, what punishment was necessary to promote proper respect for and compliance with judicial processes? Considering possible damage to Vuitton's interests resulted in the petitioners' excessive sentences.

The sentences were disproportionate both to the degree of the defendants' culpability and to the nature of the criminal contempt of which they stand convicted. The Eighth Amendment of the United States Constitution prohibits the imposition of cruel or unusual punishments and requires that any sentence imposed be proportionate to the crime committed, *Solem v. Helm*, 463 U.S. 277, 284 (1983), and to "sentences imposed on similarly situated defendants convicted of the same offense." *Gracia*, 755 F.2d at 989.

Despite Judge Oakes' observation that no violation would have occurred but for the misrepresentations and inducements

offered by Weinberg (Pet. App. A-23), the Second Circuit affirmed the imposition of what the trial court termed the maximum sentence possible⁴⁴—five years—on Klayminc, whom the Court considered “the principal malefactor” (R. 241). The other defendants were sentenced “proportionately”. Each of the petitioners sentences is excessive because Klayminc’s “benchmark” sentence was excessive and because two other equally culpable defendants, Rochman and Pariseault, both received probation.

Also, the court below did not fully consider mitigating factors for each defendant. For a thorough report of each defendant's background, the Court is respectfully referred to the pre-sentence reports, which accompany the record from the court below.

In summary, the Court should review these factors and impose a more appropriately tailored sentence in relation to the culpability of the defendants.

⁴⁴ The District Court said that *United States v. Gracia*, 755 F.2d 984 (2d Cir. 1985) set a limit on criminal contempt sentences of five years. In fact, neither *Gracia* nor the statute fix a maximum sentence.

The Trademark Counterfeiting Act of 1984, 18 U.S.C. § 2320 (1984), provides a maximum penalty of five years for the intentional trafficking or the attempt to so traffic such goods.

CONCLUSION

The decision of the Second Circuit should be reversed and the Order to Show Cause dismissed.

Respectfully submitted,

WILLIAM WEININGER
845 Third Avenue
New York, NY 10022
(212) 308-3767
Counsel for Petitioner
Sol Klayminc

THOMAS R. MATARAZZO
4009 Fifth Avenue
Brooklyn, NY 11232
(718) 853-4040
Counsel for Petitioner
Nathan Helfand

MITCHEL B. CRANER
666 Fifth Avenue
13th Floor
New York, NY 10103
(212) 757-9350
Counsel for Petitioner
George Cariste

JAMES A. COHEN, ESQ.
WASHINGTON SQUARE LEGAL SERVICES, INC.
715 Broadway, 4th Floor
New York, NY 10003
(212) 505-7400

Counsel for Petitioner
Barry Dean Klayminc

On the Brief:
GAIL HEATHERLY
STUART B. KATZ
JOHN O'HALLORAN
JOHN SIPOS

Legal Interns.

LEONARD J. COMDEN
WASSERMAN, COMDEN & CASSELMAN
5567 Reseda Blvd.
Suite 330
Tarzana, CA 91356
(818) 705-6800
Counsel for Petitioner
Gerald Young

SEP 6 1986

JOSEPH E. SPANIOLO, JR.

In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

GLORIA C. PHARES
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will address the following question:

Whether this Court, in the exercise of its supervisory authority over the conduct of contempt proceedings in federal district courts, should adopt a rule barring the appointment of counsel for an interested private party to prosecute charges of criminal contempt based on the alleged violation of an injunction entered in a civil case.

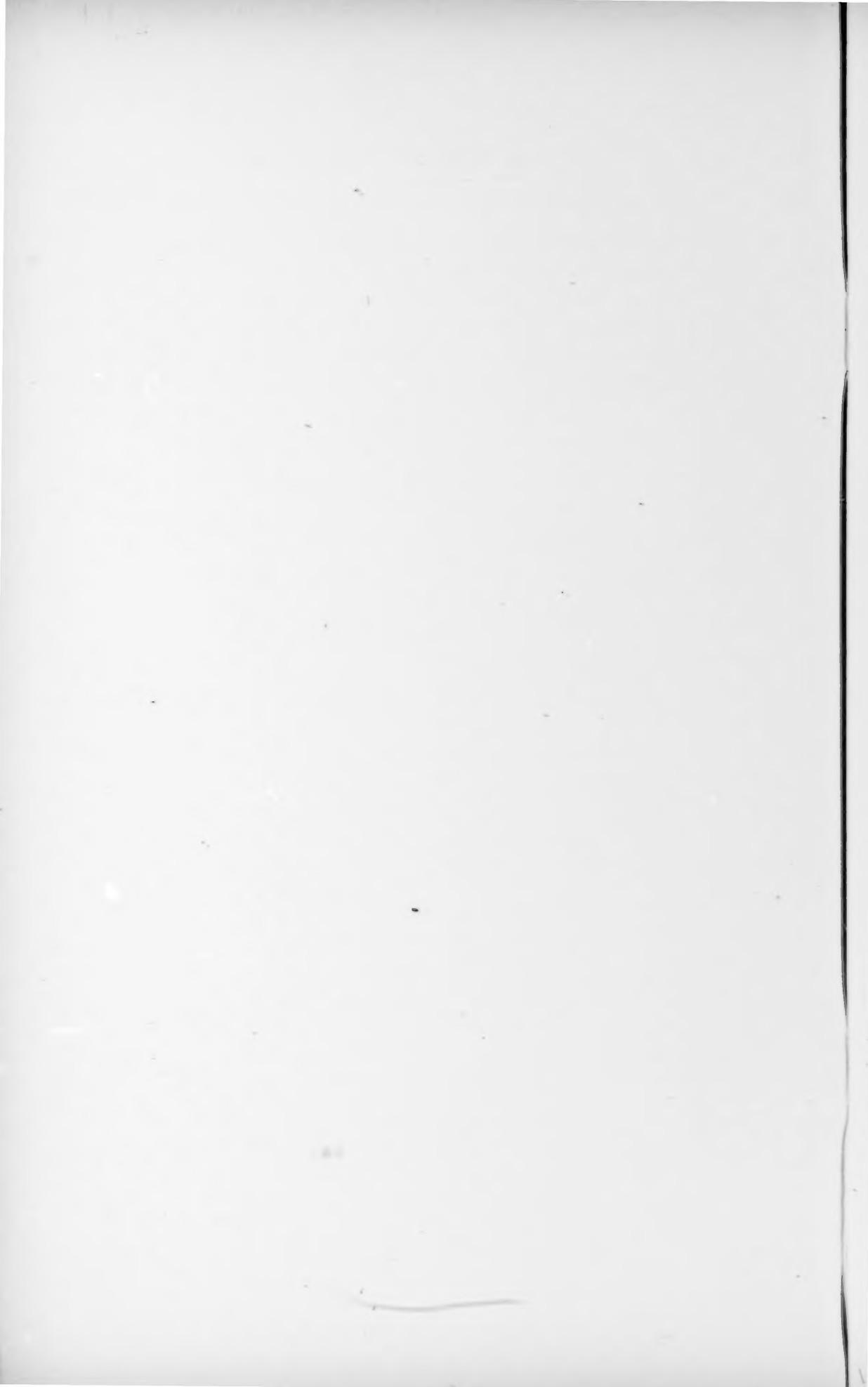


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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1329

GERALD J. YOUNG, GEORGE CARISTE,
SOL N. KLAYMINC AND NATHAN HELFAND, PETITIONERS

v.

UNITED STATES OF AMERICA EX REL.
VUITTON ET FILS S.A. AND LOUIS VUITTON S.A.

No. 85-6207

BARRY DEAN KLAYMINC, PETITIONER

v.

UNITED STATES OF AMERICA EX REL.
VUITTON ET FILS S.A. AND LOUIS VUITTON S.A.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

INTEREST OF THE UNITED STATES

The appointment of private counsel to prosecute charges of criminal contempt in federal court implicates important interests of the United States, because federal criminal prosecutions ordinarily are conducted under the supervision of the Attorney General. 28 U.S.C. 515, 519, 547(1). The United States believes that departures from this practice must be carefully circumscribed and should be permitted only on the basis of substantial justification and only in conformity with principles of fairness, sound

judicial administration, and the disinterested exercise of federal prosecutorial responsibility.¹

STATEMENT

1. The relators in these prosecutions for criminal contempt—Vuitton et Fils S.A. and Louis Vuitton S.A. (“Vuitton”)—sell luggage, handbags, and accessories under Vuitton’s registered trademark. *Vuitton et Fils S.A. v. J. Young Enterprises, Inc.*, 644 F.2d 769, 772 (9th Cir. 1981); C.A. App. 438A, 455A.² On December 6, 1978, Vuitton filed an action in the United States District Court for the Southern District of New York, seeking damages and injunctive relief for alleged acts of trademark infringement and unfair competition in violation of 15 U.S.C. 1114 and 1125 and state law (C.A. App. 426A-432A).³ On December 12, 1978, with the consent of the defendants, the court entered a preliminary injunction barring petitioner Sol Klaymine and two family-owned businesses from infringing Vuitton’s trademark. Klaymine’s wife, his son (petitioner Barry Klaymine),

¹ The respondent in each of these cases is the United States, albeit on the relation of private entities, and the United States is the proper opposing party in any prosecution for criminal contempt. See note 15, *infra*. This case therefore would appear to fall within the scope of 28 U.S.C. 518(a), which provides that unless “the Attorney General in a particular case directs otherwise,” the Solicitor General is to conduct and argue all cases in this Court “in which the United States is interested.” However, in order to assure that the Court may have the benefit of the arguments in support of the appointment of interested private counsel in a case such as this, the Solicitor General has authorized the counsel who were appointed by the district court to appear on behalf of the respondent in this Court as well. Accordingly, the Solicitor General files this brief on behalf of the United States as amicus curiae to express the distinct views of the Executive Branch.

² “C.A. App.” refers to the joint appendix and the supplemental appendix of appellee filed in the court of appeals. “Pet. App.” refers to the appendix to the petition for a writ of certiorari in No. 85-1329.

³ As of 1984, Vuitton had brought more than 80 such actions to protect its trademark and profits. Pet. App. 116A; *In re Vuitton et Fils S.A.*, 606 F.2d 1, 2 (2d Cir. 1979).

and another family-owned business subsequently were joined as defendants. Pet. App. 5A, 116A-117A.

On July 8, 1981, the district court, upon Vuitton's application, issued an order directing Sol Klayminc and others to show cause why they should not be held in criminal contempt for violating the preliminary injunction. The court appointed Vuitton's counsel, J. Joseph Bainton, to prosecute the criminal contempt on behalf of the United States. Pet. App. 117A-118A; C.A. App. 473A-476A. The charges were referred to a magistrate, who convicted Sol Klayminc and two family-owned businesses of contempt. Thereafter, on July 30, 1982, a consent judgment was entered in the underlying civil action. The consent judgment required the Klaymincs and persons acting in concert with them to refrain from manufacturing, distributing, or simulating goods in violation of Vuitton's trademarks. Sol and Barry Klayminc and other defendants also agreed to pay Vuitton \$100,000. Pet. App. 6A, 118A-119A, 193A-204A. When the magistrate was informed of this settlement, he suspended Sol Klayminc's sentence on the criminal contempt conviction and placed him on one year's probation. C.A. App. 595A; Pet. App. 10A n.1, 118A-119A.

2. In early 1983, a private investigating firm in Florida proposed to Vuitton and other owners of fashion trademarks that they share the expenses of a "sting" operation to identify persons who were infringing their trademarks. Under the arrangement, employees of the Florida firm posed as persons interested in buying and selling counterfeit merchandise on a large scale. Pet. App. 6A-7A, 119A-120A. The principal investigator was Melvin Weinberg, who had participated in the "Abscam" investigation (*id.* at 120A).

Early in the investigation, Weinberg met with petitioners Helfand and Sol Klayminc and discussed the prospects for selling counterfeit Vuitton wares and locating investors to finance a factory Klayminc was operating in Haiti. Klayminc stated that his son, Barry, had a 25% interest in the Haitian operation and that counterfeit Vuitton merchandise could be obtained from a man

in New Jersey named "George," a reference to petitioner Cariste. Pet. App. 8A-9A, 121A; C.A. App. 612A-615A, 644A-645A, 656A-657A, 1898A-1900A.

3. Three days later Bainton, the attorney for Vuitton, informed the district court of these events (J.A. 18-26; C.A. App. 606A-618A). Bainton and his law partner, Robert P. Devlin, sought to be appointed "to continue the investigation and, in due course, the prosecution of what appears to be a massive international conspiracy to violate this Court's permanent injunction" (J.A. 25; C.A. App. 615A-616A; Pet. App. 9A, 121A-122A). In addition, Bainton advised the court that Weinberg planned to videotape a meeting on April 5, 1983, with petitioners Sol and Barry Klaymine, to which Sol Klaymine had been instructed to bring 25 of his better counterfeit Vuitton purses. Pet. App. 11A, 122A-123A; J.A. 25-26; C.A. App. 616A-617A.⁴ In an order issued under seal on March 31, 1983, the district court appointed Bainton and Devlin "to represent the United States of America in connection with the further investigation" and "the ultimate prosecution" of the apparent contempt (J.A. 27; C.A. App. 605A). The court also approved the investigation Bainton outlined in his affidavit (*ibid.*). Pet. App. 10A, 11A, 123A-124A; C.A. App. 604A-605A.

At the conclusion of a brief ex parte hearing on April 6, 1983, Judge Brieant asked Bainton to inform the United States Attorney's office about the investigation (J.A. 62-63; C.A. App. 661A-662A).⁵ Bainton did so by a letter written that same day to the Chief of the Criminal Division of that office. Bainton enclosed the order

⁴ Bainton's application noted that although a government prosecutor is not so limited, it is considered unethical for an attorney in a civil case to participate in the surreptitious recording of a conversation. See C.A. App. 617A, citing ABA Formal Op. 337 (1974).

⁵ Judge Brieant had been absent on March 31, when Bainton filed his motion for appointment. Judge Lasker granted the motion but ordered Bainton and Devlin to notify Judge Brieant of the order at the earliest opportunity. Pet. App. 10A, 12A, 124A n.1; C.A. App. 659A.

appointing him to prosecute the contempt and his supporting affidavit (J.A. 64; C.A. App. 664A). The United States Attorney's Office took no action in response to Bainton's letter.⁶ The United States Attorney's Office was again contacted on the eve of trial, but it did not enter the case. Pet. App. 12A-13A, 125A; C.A. App. 1801A, 2041A-2043A.

4. Bainton's investigation continued into May 1983. In the course of the investigation, more than 100 audio and video tapes were made of telephone calls and meetings with petitioners and others. The recorded conversations established that each of the petitioners was aware that Sol Klaymine's counterfeiting activities were unlawful (see C.A. App. 611A-612A, 1097A, 1145A-1147A, 1556A-1558A, 1560A-1564A, 1635A-1636A, 1647A-1651A).

On April 5, Klaymine met with Weinberg, as planned. He brought with him 25 counterfeit Vuitton bags, which he said had been made by petitioner Cariste. Weinberg paid Klaymine \$625 for the bags. C.A. App. 704A, 709A, 2062A. In addition, Weinberg pretended to be interested in buying 50 percent of Klaymine's operation in Haiti (*id.* at 709A, 736A, 741A-742A, 767A-768A, 864A-870A, 1545A-1546A). Klaymine told Weinberg that an injunction prevented him from making such goods, and when he stated that he could not take the chance of actually handling counterfeit bags in the United States, Weinberg suggested that Klaymine ship them to other countries (*id.* at 717A, 903A-906A, 908A).

On several occasions, Sol Klaymine told Weinberg that petitioner Young could provide fabric for the Haitian operation (C.A. App. A287). Weinberg then met with Young, who agreed to supply 5000 yards of fabric, which he could ship "any place you want" (*id.* at 1077A,

⁶ Bainton also had occasion to consult with the District Attorney's Office in Los Angeles. To ensure that electronic recordings would not violate California law, it was agreed that any investigation conducted in Los Angeles would be under the direction of the District Attorney. Pet. App. 12A n.2, 45A; J.A. 88-89; C.A. App. 665A-666A.

1586A). Barry Klaymine subsequently told Weinberg that Cariste had begun cutting bags and had sent them to Sol Klaymine in Haiti for assembly (*id.* at A367-A368; see also *id.* at 1709A, 2027A, 2371A). At a meeting with Barry Klaymine and Cariste, Weinberg said he would need 1500 handbags by May 2, and Cariste agreed to deliver them (*id.* at 2025A-2026A).

5. On April 26, Bainton applied for an order under Fed. R. Crim. P. 42(b) requiring petitioners and others to show cause why they should not be held in criminal contempt for violating the 1982 injunction (Pet. App. 14A; J.A. 99-102; C.A. App. 667A-673A). The district court issued the show cause order the same day (C.A. App. 673A).⁷

Petitioners challenged the order to show cause, the appointment of Bainton and Devlin as prosecutors, and the conduct of the investigation (Pet. App. 14A), but the district court rejected those challenges (*id.* at 114A-192A).⁸ In the trial before Judge Brieant and a jury, Bainton introduced 28 of the recorded conversations; in addition, Weinberg and David Rochman, who was charged

⁷ In July 1983, prior to petitioners' trial, Sol Klaymine and his wife filed a petition in bankruptcy (C.A. App. 681A). Vuitton filed objections to the discharge in bankruptcy of the \$80,000 the Klaymines still owed under the 1982 settlement of the civil action (*id.* at 682A-683A). Vuitton contended that the Klaymines' principal source of income was from their manufacture of counterfeit Vuitton merchandise and that they never intended to pay the \$100,000, concealed their assets, and made false assertions to the bankruptcy court (*id.* at 685A-692A). See J.A. 108-117. At a December 1983 hearing in the bankruptcy proceedings, five tape recordings made by Weinberg were admitted into evidence in support of Vuitton's objections (C.A. App. A56-A84). In an order dated January 13, 1984, the bankruptcy court granted Vuitton's motion in part and denied it in part (*id.* at 694A-700A).

⁸ To prevent any prejudice to petitioners that could have resulted from the conflict between Bainton's privileged relation with Vuitton and the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. 3500, the district court ruled that by authorizing Bainton to pursue the criminal contempt, Vuitton had waived any privilege it might have regarding such information. Pet. App. 161A-162A.

in the show cause order, testified for the prosecution at trial.⁹ At the conclusion of the trial, Sol Klayminc was convicted of criminal contempt, in violation of 18 U.S.C. 401(3), and the other petitioners were convicted of aiding and abetting that contempt, in violation of 18 U.S.C. 401(3) and 2. Petitioners were sentenced to the following terms of imprisonment: Sol Klayminc, 5 years; Young, 2½ years; Barry Klayminc, 9 months; Cariste, 9 months; and Helfand, 6 months.

6. A divided panel of the court of appeals affirmed the convictions (Pet. App. 1A-48A). On the authority of prior Second Circuit precedent, the court rejected petitioners' claim that the appointment of Bainton to prosecute the contempt charges under Fed. R. Crim. P. 42(b) violated their due process right to a disinterested prosecutor. Pet. App. 17A-22A, citing *Musidor, B.V. v. Great American Screen*, 658 F.2d 60 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982), and *McCann v. New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935), cert. denied, 299 U.S. 603 (1936). The court concluded that a defendant's right to a disinterested prosecutor "is not absolute," because a prosecutor's preconceived belief in a defendant's guilt is not a ground for disqualification, as it would be for a judge or juror (Pet. App. 18A-20A). Moreover the court noted that attorneys appointed pursuant to Rule 42(b) are subject to judicial control, particularly because the judge decides whether to prosecute (Pet. App. 20A-21A). Finally, the court noted that coun-

⁹ Pursuant to an agreement with Bainton, Rochman pleaded guilty to a petty violation of 18 U.S.C. 401, in return for his testimony for the prosecution. Concurrently with the plea agreement, Bainton, as counsel for Vuitton and others, represented to Rochman's attorney that if Rochman performed as provided in the plea agreement, a civil suit filed by Vuitton against Rochman and others would be dismissed with prejudice. J.A. 103-107; C.A. App. A85-A89, 2345A-2348A.

Following the trial of the other defendants, Robert G. Pariseault, who also was charged in the show cause order, pleaded guilty to a misdemeanor violation of 18 U.S.C. 401. See 9/11/84 Tr. 3-4. Vuitton also simultaneously settled its civil litigation against Pariseault.

sel for the plaintiff in the underlying civil action are most familiar with the case and therefore can prosecute the criminal contempt most efficiently (*id.* at 17A-18A).

The court of appeals likewise rejected petitioners' argument that Rule 42(b) does not permit the specially appointed private counsel to conduct a wide-ranging investigation. The court held that the power to prosecute encompasses the power to investigate and to gather evidence by means of a "sting" operation (Pet. App. 24A). Because Bainton's investigation was undertaken with the approval of the district court, the court of appeals held, it was not unethical (*id.* at 24A-25A).

Judge Oakes dissented (Pet. App. 34A-48A). He did not question the authority of the district court to appoint counsel for an interested private party to prosecute the contempt charges (*id.* at 36A). But Judge Oakes concluded that the convictions should be reversed because, in his view, there was an insufficient showing of need for Bainton's investigatory techniques and inadequate provision for supervising them (*id.* at 37A-48A). Judge Oakes took the position that, in light of the possibility that animosities in the related civil litigation could improperly influence the investigation, a court should permit a private attorney appointed under Rule 42(b) to conduct a "sting" operation in these circumstances only on the basis of "a strong showing that a court order has been violated and where there is no other way of catching the contemners" (Pet. App. 36A). In this case, although counsel's application for appointment indicated that petitioners already had violated the injunction, Judge Oakes concluded that petitioners "had probably not violated the earlier order at that time and * * * the investigation may have been the proximate cause of the violation" (*id.* at 47A-48A).

SUMMARY OF ARGUMENT

A. The Executive Branch, like the Judicial Branch, has legitimate interests in the prosecution of criminal contempts, because those prosecutions protect the general public order as well as the courts' need to enforce judicial

authority. The interests of both Branches will be vindicated if the United States Attorney brings a prosecution. That course would render it unnecessary for the court to assert the contempt power, which is always to be exercised with self-restraint.

Accordingly, before a district court appoints a private attorney to prosecute a criminal contempt under Rule 42(b), it should first refer the matter to the United States Attorney. If the United States Attorney concludes after any necessary grand jury or other investigation that prosecution is warranted, he may file an indictment or information or apply for an order to show cause under Rule 42(b). Even if the United States Attorney concludes that contempt charges should not be brought, referring the case to the United States Attorney for his consideration is still a useful measure, since the United States Attorney's detached review might prevent an imprudent exercise of the contempt power by the court. Referral is especially appropriate where the violation of an injunction also violates a federal criminal statute. The United States Attorney can then evaluate the evidence in light of prosecutorial standards under the substantive statute, taking into account the need to vindicate the court's authority.

If the United States Attorney declines to prosecute the contempt, the court is not barred from appointing a private attorney to do so. The Appointments Clause of the Constitution expressly permits Congress to vest appointing authority in the courts. Similarly, although separation of powers principles require that ordinary criminal cases be prosecuted exclusively by Executive Branch officials, those principles do not bar a court from appointing a private attorney where the court itself initiates the proceedings in the exercise of its special power to punish contempts.

B. If the United States Attorney chooses not to prosecute the contempt in a case such as this one, the court should not appoint the attorney who represents an interested private party in the underlying civil litigation to do so. If a Justice Department attorney who represented

that private party also brought a related criminal prosecution on behalf of the United States, he would violate the criminal conflict-of-interest laws, departmental regulations, and ethical standards. This Court should exercise its supervisory authority to require that a district court adhere to similar standards of disinterested prosecution if it appoints a private attorney to prosecute the contempt charges. The Court may adopt such a supervisory rule, because it relates to the internal operations of the Judicial Branch and the courts' recognized authority to regulate the conduct of attorneys as officers of the court.

A rule barring the appointment of counsel for an interested private party to prosecute a serious criminal contempt under Rule 42(b) would constitute a sound exercise of supervisory power. It would conform such appointments to the federal tradition of public prosecutions; it would respect conflict-of-interest standards enacted by Congress; and it would avoid the risk that private financial interests could taint the decisionmaking process in serious criminal cases. Employing the supervisory power is also appropriate because it would avoid the need to resolve more sweeping claims under the Due Process Clause, and it would preserve the flexibility that is needed to address the complex questions involved in the wide variety of contempt cases that arise from violations of court orders in civil litigation.

ARGUMENT

AN ATTORNEY WHO REPRESENTS AN INTERESTED PRIVATE PARTY IN CIVIL LITIGATION SHOULD NOT BE APPOINTED TO PROSECUTE CHARGES OF CRIMINAL CONTEMPT ARISING OUT OF THAT LITIGATION

Petitioners contend that the appointment of Vuitton's attorneys to prosecute the charges of criminal contempt violated due process by depriving them of their asserted right to a disinterested prosecutor. In our view, there is no need for the Court to decide that constitutional question, because the Court may properly find the appointment to have been improper in the exercise of this

Court's special supervisory authority over the punishment of contempts in the federal courts.

The Sixth Circuit recently held, in the exercise of its supervisory power, that a district court may not appoint the attorney for an interested private litigant to prosecute related charges of criminal contempt. *Polo Fashions, Inc. v. Stock Buyers International, Inc.*, 760 F.2d 698 (1985), petition for cert. pending, No. 85-455.¹⁰ In response to this Court's invitation, the Solicitor General filed an amicus curiae brief on behalf of the United States in *Polo Fashions*, in which we argued (U.S. Br. 7-15) that the Sixth Circuit did not exceed its supervisory authority by establishing a general rule barring the appointment of counsel for an interested private party to prosecute charges of criminal contempt in that circuit. We now urge this Court to take a similar approach by exercising its supervisory power to bar such appointments in the federal courts generally.

Before considering whether the Court should exercise its supervisory power in this manner, the Court must address the threshold question whether a district court may ever appoint a private attorney to prosecute contempts under Rule 42(b). We submit that private counsel should not be appointed under Rule 42(b) to prosecute charges of criminal contempt unless the allegations have first been referred to the United States Attorney and he has declined prosecution.

A. Before Appointing A Private Attorney To Prosecute A Criminal Contempt, The Court Should First Formally Refer The Matter To The United States Attorney

1. Contempt proceedings differ from ordinary criminal cases, because they serve not only the general interests of public order, but also the particular interest of the courts in vindicating judicial authority. For that reason, both the Executive Branch and the Judicial Branch have

¹⁰ The Sixth Circuit expressly declined to hold that such an appointment "constitutes a per se due process violation" (760 F.2d at 704).

legitimate interests in the prosecution of criminal contempts in appropriate circumstances. The need to accommodate the interests of both Branches is especially strong where, as here, the alleged contempt is based on the violation of an injunction designed to regulate the conduct of private parties out of the presence of the court. In that setting, the interest of the court in ensuring the integrity of judicial proceedings is presented with less immediacy than in the case of contempts that are committed in the presence of the court and are properly punished by summary procedures. *United States v. Wilson*, 421 U.S. 309, 315-319 (1975); *Taylor v. Hayes*, 418 U.S. 488, 497-500 (1974). By the same token, the violation of such an injunction may closely resemble an ordinary criminal offense that is based directly on the violation of a federal statute. Compare *Bloom v. Illinois*, 391 U.S. 194, 201 (1968); *Green v. United States*, 356 U.S. 165, 218-219 (1958) (Black, J., dissenting). Such offenses are deemed to injure the public generally and are properly within the domain of the public prosecutor, the Attorney General.

These considerations suggest that private counsel should not be appointed to prosecute criminal contempts unless it is clear that important interests of the Judicial Branch will not be adequately protected by the Executive Branch's performance of its constitutionally assigned functions. Such deference by the courts to the usual procedures for enforcing the criminal law when possible not only accords respect to the United States Attorney, as the representative of a coordinate Branch with the responsibility for invoking the judicial power; it also comports with this Court's self-imposed limitation on the unilateral assertion of the judicial power in contempt proceedings, which requires that "a court must exercise '[t]he least possible power adequate to the end proposed.'" *Shillitani v. United States*, 384 U.S. 364, 371 (1966), quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821). See also *United States v. Wilson*, 421 U.S. at 319.

Accordingly, we urge the Court to provide that allegations of criminal contempt that occur outside of the pres-

ence of the court should first be formally referred by the court to the United States Attorney. Only if the United States Attorney declines to proceed should the court consider whether to appoint a private attorney to assist the court in the adjudication of the charges. This is the approach suggested by the Sixth Circuit in *Polo Fashions*. See 760 F.2d at 705 ("If the United States Attorney should decline to prosecute upon request, then the district court may appoint one or more disinterested attorneys to do so."). See also *United States v. McKenzie*, 735 F.2d 907, 909-910 (5th Cir. 1984); *Brotherhood of Locomotive Firemen and Enginemen v. United States*, 411 F.2d 312, 319-320 (5th Cir. 1969); S. Rapalje, *A Treatise on Contempt* § 127, at 175 (1884), citing *Durant v. Washington County*, 8 F. Cas. 128, 129 (C.C. D. Iowa 1869) (No. 4,191) (Miller, Circuit Justice).

If the district court makes such a referral, the United States Attorney may conduct any additional investigation that may be necessary, either by presenting the matter to the grand jury or by using other investigative resources available to the government.¹¹ If the United

¹¹ Such an investigation would be conducted under governmental supervision and established Justice Department guidelines. For example, the Attorney General has approved detailed substantive and procedural guidelines for the conduct of undercover investigations. See C.A. App. A399-A418; *FBI Undercover Activities, Authorization, and H.R. 3232: Oversight Hearings Before the Sub-comm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 264-374 (1983). Reliance on that investigative authority would eliminate the concerns raised in this case about the propriety and scope of an investigation conducted by private counsel appointed pursuant to Rule 42(b). These concerns are heightened where the attorney appointed pursuant to Rule 42(b) represents a party who has an interest in the matter, because of the possibility that the contempt might actually be prompted by undercover techniques that were pursued in part to advance the interests of the lawyer's private client (see notes 7, 9, *supra*) or resulted from animosities that developed in the civil litigation. See Pet. Br. 27-29, 33-34, 40-41; Pet. App. 34A-48A (Oakes, J., dissenting); cf. ABA Code of Professional Responsibility, DR 1-102(A)(4) (1979); ABA Formal Ops. 336, 337 (1974). Although we would hesitate to say that a court is without power to

States Attorney concludes that prosecution is warranted, judicial proceedings can be commenced by the filing of an information or indictment in accordance with the procedures governing federal criminal prosecutions generally. Fed. R. Crim. P. 7(a). See, e.g., *United States v. Armstrong*, 781 F.2d 700, 703-704 (9th Cir. 1986); *United States v. Squartino*, 778 F.2d 734 (11th Cir. 1985); *United States v. Williams*, 622 F.2d 830, 837-838 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981); cf. *United States v. Shipp*, 203 U.S. 563 (1906) (criminal contempt proceedings initiated in this Court by Attorney General's filing of an information). Alternatively, the United States Attorney can present charges of criminal contempt to the district court by filing an application for an order to show cause, a mode of proceeding that is expressly contemplated by Rule 42(b). See *United States v. Barnett*, 376 U.S. 681, 686 (1964); *Frank v. United States*, 384 F.2d 276, 278 (10th Cir. 1967), aff'd on other grounds, 395 U.S. 147 (1969).

Referring allegations of criminal contempt to the United States Attorney is appropriate for a number of reasons. The public prosecutor's judgment that contempt charges should not be brought is ordinarily entitled to respect by the court, because it reflects a disinterested assessment of the appropriateness of seeking criminal sanctions for particular conduct, with due regard for the

authorize a private attorney appointed under Rule 42(b) to employ undercover techniques under any circumstances, such investigations ordinarily should be undertaken by the arm of government with the constitutional and statutory responsibility, as well as the necessary experience, "to detect and prosecute crimes against the United States" (28 U.S.C. 533(1)).

Contrary to petitioners' suggestion (Pet. Br. 40-41), however, a private attorney appointed by a court pursuant to Rule 42(b) would in no event have authority to appear before the grand jury and present evidence to it. That is the sole responsibility of "[a]ttorneys for the government" (Fed. R. Crim. P. 6(d)), a term that is specifically limited to the Attorney General, United States Attorneys, and their authorized assistants (Fed. R. Crim. P. 54(c)). See *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 426, 428 (1983).

importance of preserving the integrity of the court's processes.¹² See *United States v. McKenzie*, 735 F.2d at 910; Note, *Private Prosecutors in Criminal Contempt Actions Under Rule 42(b) of the Federal Rules of Criminal Procedure*, 54 Ford. L. Rev. 1141, 1168 & n.121 (1986). This review by the disinterested public prosecutor can serve as an important independent check against the potential for arbitrary exercise of the contempt power that might occasionally result from conduct that "often strikes at the most vulnerable and human qualities of a judge's temperament." *Bloom v. Illinois*, 391 U.S. at 202.

The referral process is particularly appropriate when the contemnor's conduct in violation of an injunction also contravenes a federal criminal statute, as would now be true with respect to petitioners' conduct by virtue of a federal statute enacted in 1984 that prohibits trademark infringement. 18 U.S.C. (Supp. II) 2320. The United States Attorney may then evaluate the evidence in light of the general prosecutorial standards that the Department of Justice applies in enforcing federal criminal laws, to determine whether the particular conduct warrants prosecution. Among the factors bearing on that determination, of course, is the fact that the particular conduct also violates a court order. If the United States Attorney decides to prosecute the contemnor for the substantive offense, the interest underlying the contempt power—enforcing compliance with judicial orders—would also be vindicated.

The statutory provisions relating to criminal contempt also suggest that ordinarily such contempts should be prosecuted by the United States Attorney. Congress has

¹² See *United States Attorney's Manual* § 3-39.318 (1984):

In the great majority of cases the dedication of the executive branch to the preservation of respect for judicial authority makes the acceptance by the U.S. Attorney of the court's request to prosecute a mere formality; however, there may be sound reasons in a given case for the U.S. Attorney to decline participation in the proceedings and for the prosecution to be conducted on behalf of the court by private counsel appointed by the court for this purpose.

provided that any person whose actions in violation of a court order also constitute a criminal offense under federal or state law "shall be prosecuted for such contempt as provided in [18 U.S.C. 3691]." 18 U.S.C. 402. Section 3691 in turn provides that the accused "shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases." The usual "practice in other criminal cases" arising under federal law of course is that the prosecution is brought by the United States Attorney, under the supervision of the Attorney General. 28 U.S.C. 515, 519, 549(1). Referring the allegations of contempt to the United States Attorney in the first instance would enable the district court to "conform as near as may be" to that practice.

That legislative judgment is relevant to this case because the right to a jury trial, although not statutorily guaranteed by 18 U.S.C. 402 and 3691, was constitutionally protected for the four petitioners who received sentences in excess of 6 months. See *Bloom v. Illinois*, *supra*; *Baldwin v. New York*, 399 U.S. 66 (1970); *Taylor v. Hayes*, 418 U.S. at 495-496. The decision in *Bloom* extending the jury trial right to criminal contempt rested in large part on the Court's conclusions that "[c]riminal contempt is a crime in the ordinary sense" (391 U.S. at 201) and that "[i]n modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases" (*id.* at 207; see *id.* at 202-206). Because Congress regarded a jury trial as the hallmark of a criminal prosecution when it enacted 18 U.S.C. 402 and 3691 (see *Bloom*, 391 U.S. at 204 n.6), and because in modern times the prosecutors in jury trials in federal criminal cases are "public officials" who must "serve the public interest" (*Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249 (1980), citing *Berger v. United States*, 295 U.S. 78, 88 (1935)), a district court should endeavor to conform to the custom of public prosecution under the supervision of the Attorney General whenever the constitutional right to a jury trial is implicated.¹⁸

¹⁸ The district court in this case was sensitive to these concerns, because it directed Bainton to inform the United States Attorney's

2. If the United States Attorney declines prosecution, but the district court nevertheless concludes that the circumstances are sufficiently compelling to justify contempt sanctions, it is our view that the court may exercise the authority conferred by Rule 42(b) to appoint an attorney from outside the Executive Branch to prosecute the charges. We therefore do not endorse petitioners' contention (Pet. Br. 42-44) that the constitutional doctrine of separation of powers absolutely prohibits a court from appointing private counsel to assist it in adjudicating charges of criminal contempt, even where the court has been unable to enlist the aid of the Executive.

The Appointments Clause of the Constitution (Art. II, § 2, Cl. 2) permits Congress to vest the appointment of "inferior Officers" of the United States not only in the President and the Heads of Departments, but also in the "Courts of Law." Accordingly, even assuming that an attorney specially appointed by the court under Fed. R. Crim. P. 42(b) to present and prosecute charges of criminal contempt is an "officer" rather than an "employee" of the government (see *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976)), the appointment would satisfy the Appointments Clause. See *Ex parte Siebold*, 100 U.S. 371, 397-398 (1879). Petitioners' reliance on *Buckley v. Valeo*, which enforced the principles of separation of powers that are specifically embodied in the Appointments Clause, therefore is without merit as well.

Office of the contempt allegations and the results of his investigation. See pages 4-5, *supra*. By that time, however, Bainton already had been appointed to continue the investigation and prosecute the contempt, and it is understandable that the United States Attorney did not attempt to intervene. In our view, the referral to the United States Attorney ordinarily should occur at an earlier stage, prior to any appointment of private counsel to investigate or prosecute. Moreover, where the district court contemplates that it will institute proceedings under Rule 42(b) if the United States Attorney declines prosecution, the referral should make the court's intentions clear and reflect an actual request by the court itself that the United States Attorney assume responsibility for the matter, not merely a notification of that Office as a matter of courtesy.

Of course, the mere fact that a person is appointed in accordance with constitutional requirements does not insulate his performance from scrutiny under the doctrine of separation of powers. *Bowsher v. Synar*, No. 85-1377 (July 7, 1986), slip op. 6-11. Moreover, the actual prosecution of federal crimes is uniquely the responsibility of the Executive Branch and cannot be usurped by the Judiciary. *Buckley v. Valeo*, 424 U.S. at 138; *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Ponzi v. Fessenden*, 258 U.S. 254, 262 (1922); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-459 (1868); *United States v. Cox*, 342 F.2d 167, 193 (5th Cir.), cert. denied, 381 U.S. 935 (1965). For this reason, when a prosecution for contempt is initiated by indictment or information signed by the attorney for the government, that prosecution must remain under the control of the Attorney General.

However, Rule 42(b) contemplates that punishment for criminal contempt may also be imposed in proceedings initiated by the court itself. This power was recognized by Congress in Section 17 of the Judiciary Act of 1789, ch. 20, 1 Stat. 83, and it has been recognized by this Court ever since as an integral attribute of the federal courts that is essential to their ability to enforce their authority. See, e.g., *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) at 207; *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1873); *Ex parte Terry*, 128 U.S. 289, 302-304 (1888); *In re Debs*, 158 U.S. 564, 594-595 (1895). The existence of this power of self-protection, when exercised in accordance with the limitations prescribed by the Constitution, Congress, and this Court, is not inconsistent with the separation of powers among the Branches, and indeed it promotes a certain balance among those powers. In light of the firmly rooted nature of the courts' power to punish contempts, we do not believe that either the Appointments Clause or the more general doctrine of separation of powers bars a court from appointing an attorney from outside the Executive Branch to assist it in the exercise of that power—at least where the United States Attorney has declined prosecution and

the contempt by a private party does not arise out of litigation to which the United States or an agency or officer thereof is a party.¹⁴

**B. If The United States Attorney Declines To Prosecute,
A Private Attorney Appointed To Prosecute Serious
Contempt Charges Should Be Disinterested In The
Same Manner As The United States Attorney**

If the district court chooses to proceed with the adjudication of the contempt charges in a case such as this, despite the United States Attorney's decision not to do so, the attorney appointed by the court to present and prosecute those charges should not be the attorney for a party in the related private civil litigation. In our view, this Court has ample supervisory authority to bar such appointments in the federal courts and to require instead that private attorneys appointed to prosecute serious criminal contempt charges on behalf of the United States under Rule 42(b)¹⁵ must satisfy the same standards as if they had been appointed by the Attorney General to prosecute the charges.

¹⁴ The departure from the exclusive authority of the Attorney General to prosecute federal crimes in these limited settings is similar to two other situations in which Congress has authorized judicial appointment of officials to bring federal criminal prosecutions in narrowly defined circumstances. For example, under 28 U.S.C. 546 (first enacted in the Act of March 3, 1863, ch. 93, § 2, 12 Stat. 768), when there is a vacancy in the office of United States Attorney, the district court may appoint a United States Attorney to serve until the vacancy is filled. See *United States v. Solomon*, 216 F. Supp. 835, 841, 842-843 (S.D.N.Y. 1963). Similarly, under 28 U.S.C. 593, a special court, on the motion of the Attorney General, may appoint an independent counsel to investigate and prosecute crimes involving certain high-ranking government officials.

¹⁵ Criminal contempt proceedings arising out of civil litigation "are between the public and the defendant, and are not a part of the original cause" (*Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 445 (1911)). An attorney appointed to prosecute the contempt charges therefore represents the United States, not a private client who has an interest in the matter. The district court in this case expressly appointed Bainton and Devlin "to represent the United States" (C.A. App. 473A).

The appointment in this case did not satisfy those standards. If a Justice Department attorney who represented an interested private party in civil litigation brought a related federal criminal prosecution on behalf of the United States, he would commit a felony under the governing conflict-of-interest statute, 18 U.S.C. 208(a). In addition, the attorney's participation despite the differing interests of his two clients (the private party and the United States) would violate the ABA Code of Professional Responsibility (1979),¹⁶ which is binding upon attorneys employed by the Department of Justice (see 28 C.F.R. 45.735-1(b)) and which has been adopted by the District Court for the Southern District of New York to govern the conduct of attorneys appearing before it.¹⁷ At least in the case of serious charges of criminal contempt, the mere fact that the attorney representing the United States is appointed by the court rather than the Attorney General does not warrant a departure from the generally applicable standards of conduct prescribed by Congress, the Attorney General, the legal profession, and the courts.¹⁸

1. This Court recently reaffirmed that the courts of appeals have the power "to mandate 'procedures deemed desirable from the viewpoint of sound judicial practice

¹⁶ See DR 5-105, EC 5-1, EC 5-2, EC 5-14, EC 5-15, EC 5-18. See also ABA Model Rules of Professional Conduct, Rules 1.7, 1.9 (1983); *Cuyler v. Sullivan*, 446 U.S. 335, 346-347 & n.11 (1980).

¹⁷ See Rule 4(f) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York.

¹⁸ By contrast, a Justice Department attorney who participated on behalf of the government in civil litigation brought against a private party would not be barred from participating on behalf of the government in criminal contempt proceedings based on the private party's violation of an injunction entered in the civil litigation. In that situation, 18 U.S.C. 208(a) is inapplicable because the attorney has no private interest resulting from his involvement in the civil litigation, and there is no conflict of interest under departmental regulations and prevailing ethical standards because the attorney is vindicating the interests of the same client in each proceeding.

although in nowise commanded by statute or by the Constitution.'" *Thomas v. Arn*, No. 84-5630 (Dec. 4, 1985), slip op. 6, quoting *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). See also *Cuyler v. Sullivan*, 446 U.S. 335, 346 n.10 (1980). This Court, too, has that power. *Bartone v. United States*, 375 U.S. 52, 54 (1963); *McNabb v. United States*, 318 U.S. 332, 341 (1943). The supervisory power does not extend to the suppression of evidence for violations of the rights of a "third party not before the court" (*United States v. Payner*, 447 U.S. 727, 735 (1980)), or to the regulation of the conduct of members of a coordinate Branch outside of the context of judicial proceedings. *Id.* at 733-735; *United States v. Hasting*, 461 U.S. 499, 505-507 (1983). But the supervisory power "rests on the firmest ground when used to establish rules of judicial procedure" (*Thomas v. Arn*, slip op. 6 n.5, citing Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1465 (1984))—i.e., to establish rules governing "technical details and policies intrinsic to the litigation process, not the regulation of primary behavior and policies extrinsic to the litigation process" (Beale, 84 Colum. L. Rev. at 1465). This distinction rests on the separation of powers under the Constitution, for it concentrates the courts' supervisory authority in aid of the exercise of the "judicial power" conferred on them by Article III. *Id.* at 1467-1468, 1508-1513. Compare *Allen v. Wright*, 468 U.S. 737, 750-751, 759-761 (1984); *United States v. Russell*, 411 U.S. 423, 435 (1973).

Fashioning a general rule barring the appointment of counsel for an interested private party would be consistent with these limitations. The power to punish for contempts "is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." *Ex parte Robinson*, 86 U.S. (19 Wall.) at 510. That power was recognized by Congress to reside in the federal courts when they were called into existence (*id.* at 510, 512): Section 17

of the Judiciary Act of 1789—the same Section that conferred on the federal courts the power to make “all necessary rules for the orderly conducting [of] business in the said courts” (compare 28 U.S.C. 2071)—provided that the courts “shall have power * * * to punish * * * all contempts of authority in any cause or hearing before the same” (1 Stat. 63). A subject matter so closely associated with the performance of the judicial function is properly subject to judicial control, not only by the trial courts in the first instance, but by the reviewing courts from a more detached perspective. And this Court in fact has regarded the exercise of the contempt power by the lower federal courts as especially suited to regulation and review under its supervisory power. See *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (no sentences in excess of 6 months without right to jury trial); *Yates v. United States*, 356 U.S. 363, 366-367 (1958) (revising sentence); *Offutt v. United States*, 348 U.S. 11, 13, 17-18 (1954) (reversal of conviction where judge became embroiled in conflict with contemnor); see also Beale, 84 Colum. L. Rev. at 1449 & n.102, 1468-1469.

The adoption of the rule we propose also may be viewed as an aspect of the recognized power of the federal courts to regulate the conduct of attorneys as officers of the court (cf. 28 U.S.C. 1654), to the extent such matters are not separately addressed by federal law (e.g., 18 U.S.C. 208) or within the domain of another Branch (e.g., 28 U.S.C. 547(1)). See, e.g., *Ex parte Robinson*, 86 U.S. (19 Wall.) at 512; *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring); *United States v. Agosto*, 675 F.2d 965, 976-977 (8th Cir.), cert. denied, 459 U.S. 834 (1982); *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978); Fed. R. Crim. P. 44(c) and advisory committee note, 18 U.S.C. at p. 650. The attorneys here appear not merely on behalf of private clients (compare *Polk County v. Dodson*, 454 U.S. 312, 318-319 (1981); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-379 (1866)); they have been appointed to assist the court in the performance of an essential judicial function, which

renders their selection uniquely a matter of judicial concern. Cf. 18 U.S.C. 401(2); *Griffin v. Thompson*, 43 U.S. (2 How.) 244, 257 (1844).

2. We also believe that the rule we propose would constitute a sound exercise of the Court's authority. Whatever may be the practice of private prosecutions in some states, the prevailing rule in the federal system is that those who prosecute crimes are "public officials" who "must serve the public interest." *Marshall v. Jerrico, Inc.*, 446 U.S. at 249; see also *Berger v. United States*, 295 U.S. 78, 88 (1935). Accordingly, when the United States Attorney has declined to prosecute what the court regards as a serious charge of criminal contempt, the court's adherence to the principles of disinterested prosecution is warranted by two factors that justified the formal referral to the United States Attorney in the first place: the requirement in 18 U.S.C. 3691 that the trial of contempts to which that statute applies "shall conform as near as may be to the practice in other criminal cases," and the established principle of self-restraint that the court's invocation of its contempt authority must be "the least possible power adequate to the end proposed." *Anderson v. Dunn*, 19 U.S. (6 Wheat.) at 231. In addition, the appointing court cannot ignore Congress's judgment that the avoidance of a financial interest on the part of the Executive Branch counterparts of attorneys appointed under Rule 42(b) is of sufficient importance to warrant felony sanctions. See 18 U.S.C. 208(a). It likewise cannot ignore this Court's concern that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Marshall v. Jerrico, Inc.*, 446 U.S. at 249-250.

Of course, a proceeding for the adjudication of criminal contempt charges is not in all respects identical to other proceedings in which conflicts of interests could arise. Where such a proceeding is initiated by the court under Rule 42(b), the actual "prosecutorial decision" is

effectively taken away from the attorney appointed by the court to present the case. Several additional factors—the historical role of the civil litigant in bringing allegations of contempt to the attention of the court, his familiarity with the case, and the recognition even today of the legitimate interest the affected private party may have in the outcome (see 18 U.S.C. 402 (fines may be ordered paid to the injured party))—also suggest that the Constitution might tolerate a greater role for the attorney for an interested private party in criminal contempt proceedings than would be permitted in the prosecution of other crimes. Cf. *Polo Fashions*, 760 F.2d at 704, 705 (attorney for interested party may assist United States Attorney or disinterested appointed counsel). Such a role might be considered, for example, where the punishment is not imprisonment (cf. *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972)), or where the nature of the contempt does not require a full-blown jury trial, with all the formalities that such a trial implies. The fact remains, however, that contempt is “a crime in the ordinary sense” (*Bloom v. Illinois*, 391 U.S. at 201), and the Court accordingly has extended to contempt proceedings most of the constitutional rights typically associated with the prosecution of ordinary crimes. See *id.* at 205-206; *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911); *Cooke v. United States*, 267 U.S. 517, 537 (1925). That characterization of the contempt sanction suggests the appropriateness of a supervisory rule that requires a disinterested prosecutor in cases of serious contempt.

Such a rule, coupled with a requirement that the charges first be referred to the United States Attorney, would constitute an important initial step in addressing the most immediate of the varied and difficult problems associated with the exercise of the contempt power in response to violations of court orders entered in private litigation. At the same time, it would be an appropriately cautious step, leaving to future cases (or to rule-making by this Court, see *Douglas Oil Co. v. Petrol Stops*

Northwest, 441 U.S. 211, 231 (1979)) the development of principles for the adjudication of contempts that result in lesser punishments. A disposition based on the Court's supervisory power also would avoid premature pronouncements regarding the reach of the Due Process Clause in this setting (see *Ashwander v. TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring)). Basing a ruling in this case on due process grounds could lead to (1) a rigidity in the exercise of a power that historically has been administered in a flexible manner in light of experience and evolving standards of fairness, and (2) a questioning of the constitutionality of statutory provisions still extant in some states that permit the private prosecution of crimes. See generally Note, *supra*, 54 Ford. L. Rev. at 1151-1155.¹⁹

Nor is there reason to believe that adherence to standards of disinterested prosecution would frustrate the ability of the courts to vindicate their authority with respect to those serious contempts that require a full-blown trial and the presence of an attorney to prosecute the charges before the court. As we have explained, referral of the matter to the United States Attorney for possible prosecution is an important source of protection. But if the United States Attorney declines prosecution and the court nevertheless concludes that the circumstances are sufficiently compelling to warrant punishment, we believe the court will have no difficulty in finding a disinterested member of the bar who can assume responsibility for presenting and prosecuting the charges. We have been informed by the General Counsel of the Administrative Office for the United States Courts that it has

¹⁹ The Court recently reiterated the view that the "rigid requirements" of impartiality applicable to judicial officers under *Tumey v. Ohio*, 273 U.S. 510 (1927), "are not applicable to those acting in a prosecutorial or plaintiff-like capacity," and that "a state legislature 'may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people.'" *Marshall v. Jerrico, Inc.*, 446 U.S. at 248-249, quoting 273 U.S. at 535.

construed the statutes appropriating funds for the operation of the federal courts to permit the payment of legal fees to attorneys appointed under Rule 42(b).²⁰

3. Of course, the supervisory power cannot be exercised in a manner that conflicts with the Constitution or an Act of Congress. *Thomas v. Arn*, slip op. 7-8. But there is no such conflict here. The Constitution surely does not *mandate* that counsel for an interested private party be appointed by a court to prosecute serious charges of criminal contempt or prohibit this Court from deeming such an attorney to be disqualified. There likewise is no inconsistency with any statutory provision. Section 17 of the Judiciary Act of 1789 did not "prescribe any special procedure for determining a matter of contempt"; it instead left the mode of proceeding "to be determined according to such established rules and principles of the common law as were applicable to our situation." *In re Savin*, 131 U.S. 267, 275-276 (1889). Although the reach of the contempt power was curtailed by the Act of March 2, 1831 (ch. 99, § 1, 4 Stat. 488), Congress once again did not prescribe detailed procedures. See *Nye v. United States*, 313 U.S. 33, 45-48 (1941); *Green v. United States*, 356 U.S. at 169-173. See also Act of November 21, 1941, ch. 492, 55 Stat. 779.

The supervisory rule we propose also does not conflict with Fed. R. Crim. P. 42(b). The Second Circuit has relied on Rule 42(b) in support of the practice it sanctioned in this case, on the ground that the advisory committee note cites *McCann v. New York Stock Exchange*, 80 F.2d 211 (2d 1935), cert. denied, 299 U.S. 603 (1936), which contemplated such appointments. See

²⁰ We have been further informed by the General Counsel of the Administrative Office that such payments have been approved on two occasions and that the attorneys were paid at the \$75 hourly rate at which private attorneys employed by the Department of Justice are compensated. The Second Circuit therefore was mistaken in its belief, expressed in *Musidor* (658 F.2d at 65), that the appointment of counsel for an interested private party is justified on the practical ground that there is no other source of funds to pay attorneys appointed under Rule 42(b).

Musidor, 658 F.2d at 64-65. However, the propriety of the appointment of interested private counsel was not directly presented in *McCann*. That case primarily addressed the problem of ascertaining when a particular contempt arising out of private civil litigation should be regarded as criminal rather than civil. The court recognized that when the United States Attorney initiates the proceedings, the criminal nature of the action will be clear. 80 F.2d at 214. The court also stated that in some instances, the judge may seek the assistance of the attorney for a private party, "who will indeed ordinarily be his only means of information when the contempt is not in his presence" (*ibid.*). But because the character of the proceeding may be more equivocal in such instances, the *McCann* court concluded that the district judge should resolve any doubts on that score by "enter[ing] an order in limine, directing the attorney to prosecute the respondent criminally on behalf of the court" (*id.* at 215).

Rule 42(b) was promulgated in 1944, after the decision in *McCann*. The second sentence of the Rule prescribes the form of notice required in a non-summary contempt, which must include a statement of "the essential facts constituting the criminal contempt charged." The third sentence then provides that the notice may be given orally by the judge in open court "or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest."

The advisory committee note states that "to obviate the frequent confusion between criminal and civil contempt proceedings," the "requirement in the second sentence that the notice shall describe the criminal contempt as such * * * follows the suggestion made in *McCann*" (emphasis added). See *United States v. United Mine Workers*, 330 U.S. 258, 298 n.66 (1947) ("[t]he rule in this respect follows the suggestion made in *McCann*"). However, the advisory committee note says nothing about the source of the reference in the third sentence of Rule 42(b) to appointed counsel, and it does not in any way

endorse the statement in *McCann* that the attorney representing a private party in related civil litigation may be designated to prosecute the contempt. In fact, the third sentence of the Rule does not go so far as to authorize even a disinterested private attorney appointed by the court to play a role in the contempt proceedings beyond filing the application for an order to show cause. Although we do not read that omission to preclude the court from appointing a private attorney to prosecute the charges, we likewise do not read the Rule or the advisory committee's note to foreclose this Court from exercising its supervisory power on this issue.²¹

4. If the Court determines that the appointment of an interested private attorney to prosecute the contempt charges was inappropriate, the question will arise whether petitioners are entitled to any relief. As a general matter, reversal of a conviction does not automatically follow

²¹ Even if the reference to *McCann* had clearly approved the practice referred to in that case, we do not believe it would bar this Court from invoking its supervisory authority in the very different setting presented here. In *McCann* itself, the only sanction, imposed without a jury trial, was a \$250 fine—a punishment of a wholly different order than the terms of imprisonment ranging between 6 months and 5 years in this case. Moreover, Justice Goldberg stated in his dissenting opinion in *United States v. Barnett*, 376 U.S. 681 (1964), that his research had disclosed only two instances of imprisonment for criminal contempt in excess of six months that had been brought to this Court's attention between the founding of the Republic and 1957 (*id.* at 752 n.35), and in each of those cases, the contempt arose in proceedings brought by the United States. The majority in *Barnett* did not dispute Justice Goldberg's research, and it in fact acknowledged that the severity of punishments for contempt had increased since 1957. 376 U.S. at 694-695. In light of these changed circumstances and the evolution of the law of contempt during the 40 years since Rule 42(b) was promulgated (see *Bloom v. Illinois*), the advisory committee note's reference to *McCann* does not foreclose this Court from barring the appointment of counsel for an interested party to prosecute a contempt in circumstances wholly different from those presented in *McCann*. Cf. *Nilva v. United States*, 352 U.S. 385, 395-396 (1957); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479 (1976).

from the fact that an error occurred in a criminal trial. Depending upon the nature of the right involved, the usual rule is that the defendant must establish that he was prejudiced, unless prejudice is so inherent, or sufficiently likely yet incapable of proof, as to require automatic reversal. See, e.g., *Rose v. Clark*, No. 84-1974 (July 2, 1986); *United States v. Mechanik*, No. 84-1640 (Feb. 25, 1986); *Strickland v. Washington*, 466 U.S. 668, 693-697 (1984).

This case presents the two-fold question whether the error of appointing the attorney for an interested party as the prosecutor is inherently prejudicial or, if not, whether petitioners were sufficiently prejudiced by the error in some way that requires that their convictions be reversed. Those questions present difficult issues that may require close familiarity with the record to resolve. Accordingly, we submit that the Court may wish to leave the matter of remedy to the court of appeals on remand.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

GLORIA C. PHARES
Attorney

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Nos. 85-1329 and 85-6207

Supreme Court, U.S.
FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

RONALD F. SPANIOL, JR.
CLERK

GERALD J. YOUNG, et al.,

Petitioners,

—against—

U.S.A. ex rel. VUITTON ET FILS S.A., et al.,

Respondent.

BARRY DEAN KLAYMINC,

Petitioner,

—against—

U.S.A. ex rel. VUITTON ET FILS S.A., et al.,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR UNITED STATES AS RESPONDENT

J. JOSEPH BAINTON

ROBERT P. DEVLIN

*Specially Appointed Attorneys
for the United States of
America*

45 Rockefeller Plaza

New York, New York 10111

Telephone: (212) 841-5700

October 27, 1986

HJM



Questions Presented

1. Whether the District Court's appointment of a civil litigant's counsel to prosecute a criminal contempt proceeding, and in connection therewith to supervise an investigation, violated petitioners' rights under the Due Process Clause of the Fifth Amendment.
2. Assuming that the District Court's appointment of a civil litigant's counsel to investigate and prosecute an alleged contempt does not violate the Due Process Clause, should this Court consider modifying the practice under Rule 42(b) of the Federal Rules of Criminal Procedure by exercising its supervisory powers in this proceeding, rather than following its usual practice in accordance with 18 U.S.C. § 3771.
3. Assuming that this is an appropriate proceeding within which to consider modifying practice under Rule 42(b), should that practice be changed.
4. Whether the Court of Appeals erred in affirming the sentences imposed upon the five petitioners.



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Additional Statutes Involved

Section 3771 of Title 18 of the United States Code provides in relevant part:

"The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

Section 1651 of Title 28 of the United States Code provides in relevant part:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

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GERALD J. YOUNG, *et al.*,

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—against—

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ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR UNITED STATES AS RESPONDENT

Statement of the Case

The Underlying Civil Action

This criminal contempt proceeding¹ arises out of a civil action commenced in the United States District Court for

¹ The respondent in each of these cases is the United States, albeit on the relation of private entities, and the United States is the proper
(footnote continued on following page)

the Southern District of New York on December 6, 1978, entitled *Vuitton et Fils S.A. v. Karen Bags, Inc., et al.*, 78 Civ. 5863 (CLB). Seeking legal and equitable relief, the complaint in that action charged that the defendants had infringed the registered trademark of plaintiff Vuitton et Fils S.A. ("Vuitton") and otherwise unfairly competed with Vuitton. (R. 426-38)²

Following the commencement of the action, Vuitton made an *ex parte* application for a temporary restraining order and an order directing that defendants show cause why a preliminary injunction should not be issued. (R. 439-70)³ That application was granted on December 7, 1978. (R. 442) On December 11, 1978, defendants consented to the entry of a preliminary injunction, which was entered on December 12, 1978. (R. 471-72)

Since the validity of Vuitton's trademark was being considered by the United States Court of Appeals for the

(footnote continued from preceding page)

opposing party in any prosecution for criminal contempt. This case therefore falls within the scope of 28 U.S.C. § 518(a), which provides that unless "the Attorney General in a particular case directs otherwise" the Solicitor General is to conduct and argue all cases in this Court "in which the United States is interested." Nonetheless, the Solicitor General has authorized the special prosecutors appointed by the District Court to appear on behalf of the United States in this Court. The Solicitor General has also filed a brief as *amicus curiae* "to express the distinct views of the Executive Branch" (Brief For The United States As *Amicus Curiae*, p. 2, n.1).

² References to the record are in the form R. [page]. The record below consists of the Second Circuit Appendix (paginated "A-1" through "A-425") and to the Supplemental Appendix (paginated "426-A" through "3195-A"). References in this brief, as in petitioners' brief, will be to the record page number only. Thus "A-25" and "1234-A" will be cited as "R. 25" and "R. 1234," respectively. Citations to the Petitioners' Appendix are in the form Pet. App. [page], and citations to the Joint Appendix are in the form J.A. [page].

³ See generally *In re Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir. 1979).

Ninth Circuit, further proceedings in this action and all similar actions commenced by Vuitton were effectively stayed pending the Ninth Circuit's decision.*

Sol Klayminc's First Contempt Trial

In July 1981, Vuitton learned that Sol Klayminc, his wife, Sylvia Klayminc, and their family-owned companies, Karen Bags, Inc. ("Karen Bags"), and Jade Handbag Co., Inc. ("Jade Handbag"), were continuing to sell counterfeit Vuitton products in wilful violation of the preliminary injunction. (R. 477-80)

Relying upon *Musidor, B.V. v. Great American Screen*, 658 F.2d 60 (2d Cir. 1981), cert. denied, 445 U.S. 944 (1982), Vuitton applied for an *ex parte* order (a) directing defendants to show cause why they should not be cited for civil and criminal contempt, (b) appointing J. Joseph Bainton (the "Special Prosecutor") to prosecute the alleged criminal contempt on behalf of the United States, and (c) directing the United States Marshal to search the premises of Karen Bags and Jade Handbag and to seize counterfeit Vuitton merchandise and records relating to this merchandise. (R. 473-516) The District Court granted that order on July 8, 1981. (R. 476)

On July 10, 1981, deputy United States Marshals seized three truckloads of counterfeit Vuitton merchandise from the business premises of Karen Bags and Jade Handbag pursuant to this order. (R. 553, 564)

During a post-arrainment hearing on October 29, 1981, the District Court suggested that the criminal contempt proceeding be referred to a United States Magistrate for

* The validity of Vuitton's trademark was eventually upheld. *Vuitton et Fils S.A. v. J. Young Enterprises*, 644 F.2d 769 (9th Cir. 1981).

trial as a petty offense. (R. 541) The Special Prosecutor noted his exception to this procedure. (R. 549-53) By memorandum and order dated December 1, 1981, the District Court directed that the contempt proceeding be referred to Magistrate Leonard A. Bernikow for trial as a petty offense.⁵ (R. 554-56)

Following trial before Magistrate Bernikow, Karen Bags, Jade Handbag and Sol Klayminc were convicted of criminal contempt. Sol Klayminc was sentenced to probation for one year. (R. 595) Prior to a scheduled sentencing hearing, Vuitton settled the underlying civil litigation and Sylvia Klayminc, Sol Klayminc, Barry Klayminc, Karen Bags and Jade Handbag agreed to the entry of an injunction prohibiting them from trafficking in counterfeit Vuitton merchandise (the "Permanent Injunction"). (R. 596-603) The District Court entered the Permanent Injunction on July 30, 1982. (R. 598)

The Florida Investigation

In early 1983, Vuitton and other owners of prestigious trademarks were contacted by the Kanner Security Group, Inc. ("Kanner"), a Florida private investigatory firm. Kanner proposed that Vuitton and the other trademark owners subsidize an undercover investigation designed to ferret out persons trading in counterfeit trademark wares on a larger scale. (Pet. App. A-3—A-4)

During the investigation, the Kanner agents posed as prospective purchasers of counterfeit goods. Two of these

⁵ The District Court thereafter granted a stay of further proceedings pending appellate consideration of a petition for a writ of mandamus directing that the District Court try the contempt as a non-petty offense. (R. 557-74) By order dated March 16, 1982, the Court of Appeals for the Second Circuit denied the petition for a writ of mandamus. (R. 575)

agents met petitioner Nathan Helfand.⁶ Helfand arranged for the investigators to purchase a variety of counterfeit trademarked goods. (Pet. App. C-4) Helfand also introduced the investigators to Sol Klayminc, and identified him as a source of counterfeit Vuitton goods. Sol Klayminc advised Helfand that he "had been 'burned' by Louis Vuitton 'to the tune of \$100,000 in New York City,'" but was still in the business of selling counterfeit Vuitton merchandise. (Pet. App. C-4) Klayminc also informed Helfand that Klayminc was operating a large handbag factory in Haiti. (Pet. App. A-4, C-4)

Helfand developed his relationship with Sol Klayminc and discussed it with the investigators. (Pet. App. C-4) The investigators advised Helfand they were prepared to invest in the Haitian enterprise. During a meeting attended by Helfand, Sol Klayminc, and Sylvia Klayminc on March 27, 1983, Sol Klayminc signed memoranda detailing his counterfeiting enterprise and the anticipated cost of the counterfeit goods. (Pet. App. A-4) He also delivered to Helfand some counterfeit Vuitton bags as "samples," and advised Helfand that a man in New Jersey named "George" (petitioner George Cariste) could provide Helfand with additional counterfeit Vuitton merchandise. (Pet. App. A-4) In addition, Sol Klayminc informed Helfand that his son, Barry, had a twenty-five percent interest in the Haitian operation. (Pet. App. A-5) Based upon these conversations, it was apparent that Sol Klayminc and his confederates were aware of the Permanent Injunction. (*Id.*)

The Order of Appointment and Continued Investigation

On March 31, 1983, Mr. Bainton requested that the District Court specially appoint him and his associate,

⁶ The two Kanner agents principally involved in the investigation were Mel Weinberg and Gunnar Askeland, a former FBI agent. Messrs. Weinberg and Askeland had both participated in the FBI's so-called "Abscam" operation. (Pet. App. A-4)

Robert P. Devlin, to prosecute the alleged criminal contempt committed by Sol Klayminc and to continue the investigation to determine the identity of the other individuals involved. (Pet. App. A-5, C-4; R. 604-57) In an affidavit submitted in support of this application, Mr. Bainton detailed the investigation, and advised the Court that he and Mr. Devlin had been appointed previously to prosecute Sol Klayminc and others for criminal contempt. (Pet. App. A-5, C-4; J.A. 18-26) Observing that an attorney specially appointed to represent the United States in a criminal contempt proceeding "stands in somewhat different shoes than a United States attorney" (Pet. App. C-5),⁷ Mr. Bainton's affidavit outlined some of the steps which he proposed to take in further investigating and prosecuting the alleged contempt:

"On the assumption that this application would be granted, preliminary arrangements have been made for a meeting among Sol, Barry, Askeland, and Weinberg at the Plaza Hotel in New York City, at noon on Tuesday, April 5, 1983 In a technical fashion similar to that employed in the Abscam operation, the meeting among those individuals will be video-taped so that at some later time there can be no question as to what was said to whom and by whom. We expect that Sol will repeat the highly incriminatory statements he made last week at dinner with Helfand and on other occasions over the telephone to Helfand Sol has also been requested to bring to the meeting 25 of his better counterfeit Vuitton satchel purses"

(Pet. App. C-5)

⁷ Recognizing that it is generally deemed unethical for an attorney to participate in surreptitious recording of conversations, Mr. Bainton noted that he would not be similarly constrained if his application were granted. (Pet. App. C-5; J.A. 26)

Based upon Mr. Bainton's affidavit, on March 31, 1983, Judge Morris E. Lasker, acting in place of District Judge Charles L. Brieant (the assigned Judge who was absent), found that "probable cause exists to believe that [Sol Klayminc, Barry Klayminc, George Cariste and others] are 'knowingly engaged in a course of conduct criminally contumacious of this Court's final consent judgment and permanent injunction filed July 30, 1982' . . ." (Pet. App. C-5; J.A. 27) The District Court thus concluded that it was proper to appoint Messrs. Bainton and Devlin (the "Special Prosecutors") to prosecute the alleged criminal contempt, and to continue their investigation of the alleged counterfeiting scheme. (Pet. App. A-5—A-6, C-5) Judge Lasker also requested that the Special Prosecutors appear before Judge Brieant to advise him of the order of appointment. (*Id.*)

On April 6, 1983, the Special Prosecutors appeared before Judge Brieant and advised him of the order of appointment. (Pet. App. A-6, C-6) They also informed the District Court of the most recent developments in the investigation, including a meeting which had been scheduled among the investigators, Sol Klayminc, and his supplier of counterfeit Vuitton material, Gerald J. Young, the following week in California. (*Id.*; J.A. 60-63) Judge Brieant requested that the Special Prosecutors fully apprise the United States Attorney for the Southern District of New York of the investigation. (Pet. App. A-6, C-6)

By letter dated April 6, 1983, Mr. Bainton fully advised Lawrence Pedowitz, Chief of the Criminal Division, Office of the United States Attorney for the Southern District of New York, respecting the status of the criminal contempt proceeding. (Pet. App. A-6, C-6; J.A. 64) Mr. Pedowitz chose not to take an active role in the proceeding and wished

Mr. Bainton "good luck." (Pet. App. A-6) Mr. Bainton also discussed the case with John Kildebeck, Head Deputy District Attorney for the County of Los Angeles. (Pet. App. A-6 n.2; J.A. 88-9) Mr. Kildebeck supervised that portion of the investigation which was conducted in California. (*Id.*)

The continued investigation enabled the Special Prosecutors to define the parameters of an already well-developed contempt. During April 1983, numerous video-tape and audio-tape recordings of meetings and telephone conversations among the petitioners and the investigators were generated. (Pet. App. A-6—A-7, C-6) These recordings later enabled the jurors to see and hear, among other things, a graphic account of a meeting at the Plaza Hotel during which Sol Klayminc sold Mr. Weinberg counterfeit Vuitton merchandise. (Pet. App. A-6—A-7)

**The Order to Show Cause, the Convictions,
and the Sentences**

On April 26, 1983, the District Court entered an order directing Sol Klayminc, Barry Klayminc, Young, David Rochman, Robert Pariseault, Helfand and Cariste to show cause why they should not be cited for civil and criminal contempt for either violating, or aiding and abetting the violation of, the Permanent Injunction (the "Order to Show Cause"). (Pet. App. A-7, C-6)

Defendants filed pretrial motions opposing the Order to Show Cause and the appointment of the Special Prosecutors, which the District Court denied on April 9, 1984. (Pet. App. C; *reported at* 592 F. Supp. 734) Rochman and Pariseault subsequently entered guilty pleas. (Pet. App. A-7) At the jury trial in May 1984, the Special Prosecutors offered the video and audio recordings as evidence through Mr. Weinberg, who was extensively cross-examined for three

days. Mr. Cariste was the only defendant who chose to testify. (Pet. App. A-7)

The jury found petitioners guilty. Petitioners were convicted of violating or aiding and abetting the violation of the Permanent Injunction. (Pet. App. B-2) Petitioners thereafter submitted post-trial motions, which the District Court denied on January 24, 1985. (Pet. App. B, *reported at* 602 F. Supp. 1052) The District Court sentenced petitioners to periods of incarceration ranging from six months to five years. (J.A. 162-64) The Second Circuit Court of Appeals affirmed the convictions. (Pet. App. A, *reported at* 780 F.2d 179)

Summary of Argument

Petitioners were convicted of criminal contempt of a court order which prohibited the infringement of a registered trademark. Petitioners seek to overturn their convictions, claiming that their Fifth Amendment Due Process rights were violated by the appointment of the trademark owner's counsel to investigate and prosecute the contempt.

Due process standards of "fundamental fairness" require that this Court balance the petitioners' interest in a fair trial against the public interest in an independent judiciary and the effective enforcement of court orders. The appointment of a civil litigant's counsel to investigate and prosecute the alleged contempts did not violate petitioners' due process rights since petitioners were afforded all the systemic protections available to them in any criminal proceeding. The appointment furthered the public interest since it represents the only feasible vehicle for enforcing court orders while preserving the independence of the judiciary. Indeed, neither petitioners nor the Solicitor General has offered any

practical alternative in the event that the Justice Department declines to prosecute contempt proceedings, as it may do.

Alternatively, petitioners request that this Court exercise its supervisory authority and effectively amend Rule 42(b) to prohibit the appointment of a civil litigant's counsel to investigate and prosecute criminal contempt proceedings. Since significant policy considerations are implicated by any substantive amendment to Rule 42(b), this Court should adhere to its prior practices and refer any such proposed amendment to an advisory committee in conformity with 18 U.S.C. § 3771.

Should this Court choose to exercise its supervisory powers, the discretionary appointment of a civil litigant's counsel to investigate and prosecute criminal contempt proceedings should be permitted since such appointments do not violate the due process rights of defendants and represent the only feasible means of enforcing court orders, thus preserving the independence of the judiciary.

The sentences imposed upon petitioners should not be modified since the District Court carefully exercised its responsibilities and the sentences do not represent an abuse of discretion.

ARGUMENT

I.

The Due Process Clause of the Fifth Amendment Does Not Prohibit the Appointment of a Civil Litigant's Counsel to Investigate and Prosecute a Criminal Contempt.

Petitioners challenge on due process grounds the practice of appointing a civil litigant's counsel to gather evidence relating to a criminal contempt and to present such evidence

to the trier of fact.⁸ The practice of appointing a civil litigant's counsel to prosecute an alleged criminal contempt antedates the adoption of the Federal Rules of Criminal Procedure; has not been altered by those rules; and has withstood repeated judicial scrutiny. Moreover, to the extent that petitioners contend that Rule 42(b) does not provide complete authority for the action taken by the District Court in this case, ample alternative authority can be found in the All Writs Act. 28 U.S.C. § 1651. This practice preserves the independence of the judiciary without compromising the due process rights of alleged contemnors.

A. The Federal Courts Exercised Their Authority to Appoint a Civil Litigant's Counsel to Prosecute a Criminal Contempt Prior to the Adoption of Rule 42(b).

The federal courts' authority to appoint a civil litigant's attorney as a special prosecutor emanates from the Constitution. The judicial power, vested by Congress in the district courts, includes the power of the courts to enforce their own orders. Absent such authority, the judiciary could hardly be considered a coequal branch of the federal

⁸ Petitioners erroneously contend that the District Court authorized an "unsupervised investigation" of defendants. This case stands on slightly different factual grounds than other similar cases because the Special Prosecutors brought to the attention of the District Court a contemptuous scheme whose boundaries were undefined and obtained permission to continue their investigation using electronic recording devices. The Court and jury thus had an opportunity to evaluate petitioners' statements and conduct without relying upon the recollection of witnesses. Cf. *United States v. Myers*, 692 F.2d 823, 860 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983).

Other than audiotaping and videotaping conversations between petitioners and the investigators, nothing occurred during the investigation in this case that does not routinely occur during a civil investigation of counterfeiters, where an investigator typically represents himself to a counterfeiter to be something which he is not, namely, another counterfeiter.

government. See *United States v. Nixon*, 418 U.S. 683, 707 (1974). As this Court observed in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 450 (1911):

"If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be a mere mockery."

The Court's contempt power, and the power to inquire into whether a contempt has been committed, is a special function of the judiciary:

"[T]he power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court."

In re Debs, 158 U.S. 564, 594 (1895).

A federal court cannot compel the executive branch to institute criminal proceedings. *United States v. Nixon*, 418 U.S. at 693. Therefore, a court's power to punish for criminal contempt necessarily includes the power to select counsel to prosecute the case.

Long before the Federal Rules of Criminal Procedure became effective on March 21, 1946, the federal courts recognized the propriety of appointing civil litigant's counsel to prosecute criminal contempts. In *McCann v. New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935), cert. denied, 299 U.S. 603 (1936), Judge Learned Hand wrote:

"[T]he court may proceed sua sponte without the assistance of any attorney, as in the case of disorder

in the courtroom; there can be little doubt about the kind of proceeding when that is done. *But the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should*"

McCann, 80 F.2d at 214 (emphasis added).

In *United States ex rel. Brown v. Lederer*, 140 F.2d 136, 138 (7th Cir.), cert. denied, 322 U.S. 734 (1944), the Seventh Circuit, following *McCann*, held:

"Appellant specifically objects to the court's appointing counsel, and insists that in a criminal contempt proceeding, the case against him should be in charge of the Attorney General or some assistant, or the United States District Attorney. In the absence of any specific statute, we think it was not only permissible but entirely appropriate that the court appoint counsel to take charge of proceedings instituted to enforce its order, and the attorneys thus appointed would be authorized to begin and carry through the contempt proceedings. The court is not required to select counsel from the staff of the United States District Attorney."

The Ninth Circuit agreed with *McCann* in *Western Fruit Growers, Inc. v. Gotfried*, 136 F.2d 98, 100-101 (9th Cir. 1943), and the Third Circuit approved of *McCann* in *In re Eskay*, 122 F.2d 819, 823 (3d Cir. 1941) (footnotes omitted), observing:

"It has been found proper for the court to have its own dignity upheld by litigant's counsel. The incentive to discover injury seems to outweigh the theoretical impartiality of the public prosecutor."

Prior to the adoption of the Federal Rules of Criminal Procedure, many other courts allowed civil litigants' counsel to prosecute criminal contempts.⁹ Thus, this practice was well established before the adoption of the Federal Rules of Criminal Procedure.

B. Rule 42(b) Did Not Alter Existing Practice.

Rule 42(b) of the Federal Rules of Criminal Procedure provides, among other things, that "[a] criminal contempt except as provided in subdivision (a)^[10] of this rule shall be prosecuted on notice," and that either the United States Attorney or an attorney appointed by the court may provide such notice:

"The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest."

Fed. R. Crim. P. 42(b) (emphasis added).

Rule 42(b) cannot reasonably be construed to restrict either the United States Attorney or the specially appointed

⁹ See, e.g., *Nye v. United States*, 113 F.2d 1006, 1007 (4th Cir. 1940), *rev'd on other grounds*, 313 U.S. 33 (1941); *In re Fletcher*, 107 F.2d 666, 667 (D.C. Cir. 1939), *cert. denied*, 309 U.S. 664 (1940); *Phillips Sheet & Tin Plate Co. v. Amalgamated Ass'n of Iron, Steel & Tin Workers*, 208 F. 335, 344 (S.D. Ohio 1913); Wright, *Civil and Criminal Contempts in the Federal Courts*, 17 F.R.D. 167, 172 (1955) ("Before the Fed. R. Crim., private parties were entitled to prosecute criminal contempt actions.").

¹⁰ Section (a) provides:

"(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

Fed. R. Crim. P. 42(a).

counsel to merely notifying defendants of the criminal contempt charges. Such an interpretation would be inconsistent with prior practice and would severely compromise the judiciary's ability to enforce its orders.

While Rule 42(b) does not expressly define the prosecutorial authority of the specially appointed counsel, the Rule clearly contemplates that counsel will prosecute the contempt fully, and will conduct any necessary investigation. As Professor Lester B. Orfield, a member of the Advisory Committee, observed: "It was not the purpose of Rule 42(b) to limit the authority of the judge, but rather to aid the judge by providing for the prosecution of the charge by an attorney rather than by the court." 5 Orfield, *Criminal Procedure Under the Federal Rules*, § 42:28 at p. 782 (1967).

Moreover, Rule 57 of the Federal Rules of Criminal Procedure, which was adopted contemporaneously with Rule 42, expressly preserves the traditional authority of the Courts to "regulate their practice in any manner not inconsistent with" the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 57; *United States v. Torres*, 751 F.2d 875, 878 (7th Cir. 1984) (Posner, J.), cert. denied, — U.S. —, 105 S. Ct. 1853 (1985).

Since the federal courts have plenary authority to enforce their orders, "and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the Court," *In re Debs*, 158 U.S. at 594, the courts necessarily have the authority to direct the investigation of alleged contempts.

This Court, the Advisory Committee and the Congress were familiar with the practice of appointing civil litigants' counsel to prosecute criminal contempts at the time the

Federal Rules of Criminal Procedure were drafted and adopted.¹¹ This practice was well established, and its constitutionality was not questioned. Indeed, Professor Orfield observed that, during the drafting process:

"[t]he attention of the Advisory Committee was called to *McCann v New York Stock Exchange*. In that case the court stated that the character of contempt proceedings, that is, whether they are criminal or civil, is determined by various elements, such as the title, imposition of costs, whether the parties are examined, and who conducted the prosecution. . . . As a simple formula, the criminal character can be determined by the fact that they are prosecuted either by the United States or by the court to assert its authority. In the first case they are easily ascertainable because openly prosecuted by the United States Attorney. In the second there is little doubt where the court proceeds *sua sponte* without the assistance of any attorney, as for disorder in the courtroom. But these are cases in which the judge prefers to use the attorney of one of the parties, as he may do."

5 Orfield, *Criminal Procedure Under the Federal Rules*, § 42:1 at p. 754 (1967) (footnote omitted).

Following the adoption of the Federal Rules of Criminal Procedure, the practice of appointing a civil litigant's coun-

¹¹ The Federal Rules of Criminal Procedure were authorized by the provisions of 18 U.S.C. § 687 (the predecessor of 18 U.S.C. § 3771). Pursuant to these provisions, Rule 42 was among the Rules prepared by an Advisory Committee appointed by this Court on February 3, 1941, which were transmitted to the Attorney General of the United States by the Chief Justice on December 26, 1944. On January 3, 1945, the Attorney General submitted the Rules to Congress, and pursuant to Fed. R. Crim. P. 59, the Rules became effective on March 21, 1946. See "History of Rules" following text of 18 U.S.C.A. § 3771 (West 1985), p. 623.

sel to prosecute criminal contempts continued. In the leading post-*McCann* decision, the Second Circuit held:

"Neither Rule 42 nor the Due Process clause requires the court to select counsel from the staff of the United States Attorney to prosecute a criminal contempt. The practicalities of the situation—when the criminal contempt occurs outside the presence of the court but in civil litigation—require that the court be permitted to appoint counsel for the opposing party to prosecute the contempt. There is no fund out of which to pay other counsel in such an event, nor would it be proper that he be paid by the opposing party. This is not the kind of case for which legal aid societies or public defenders are available. In short, we follow . . . *McCann*."

Musidor, B.V. v. Great American Screen, 658 F.2d 60, 65 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982). Accord *United States ex rel. Shell Oil Co. v. Barco Corp.*, 430 F.2d 998, 999 n.1 (8th Cir. 1970); *Frank v. United States*, 384 F.2d 276, 278 (10th Cir. 1967), aff'd on other grounds, 395 U.S. 147 (1969); *United States v. Crawford Enterprises*, Nos. H-82-224, H-83-6418, slip op. (S.D. Tex. Sept. 8, 1986); *United States v. Masselli*, 638 F. Supp. 206, 209 n.10 (S.D.N.Y. 1986); *In re C.B.S., Inc.*, 570 F. Supp. 578, 581 (E.D. La. 1983), appeal dismissed for lack of jurisdiction, 735 F.2d 907 (5th Cir. 1984); *Bays v. Petan Co.*, 94 F.R.D. 587, 589 (D. Nev. 1982); cf. *Polo Fashions, Inc. v. Stock Buyers International, Inc.*, 760 F.2d 698, 704 (6th Cir. 1985), petition for cert. filed, No. 85-455 (Sept. 17, 1985) (While the court criticized the practice, it neither addressed the due process issue nor interpreted Rule 42(b)).

No federal court other than the Sixth Circuit has held the general practice of appointing the attorney for a civil

litigant to be improper. Although *Brotherhood of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312 (5th Cir. 1969), suggests that criminal contempt proceedings should be in the exclusive control of the United States Attorney, 411 F.2d at 319, the Fifth Circuit recently declined to consider whether the dictum has any continuing validity. *United States v. McKenzie*, 735 F.2d 907, 910 n.11 (5th Cir. 1984). Similarly, in *Midway Manufacturing Co. v. Kruckenberg*, 779 F.2d 624 (11th Cir. 1986), the court also expressly declined "to decide the issue of whether there is a plenary rule forbidding in all criminal cases appointment of opposing counsel as prosecutors," and instead ordered a limited remand with instructions to the District Court to hold a hearing to determine whether "under the particular facts and circumstances of this case [the] appointment was appropriate." 779 F.2d at 626.

Accordingly, the practice of appointing a civil litigant's counsel to prosecute criminal contempts has long been sanctioned by the courts and Congress. This practice has served to ensure the integrity of court orders while preserving the independence of the judiciary.

C. The All Writs Act Provides Additional Authority for the Appointment of the Special Prosecutors.

The All Writs Act provides concomitant authority for the appointment of the Special Prosecutors:

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 1651.

The All Writs Act has consistently been construed as a broad grant of power to the judiciary enabling the courts

to effect complete justice. In *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977), this Court held:

"This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained: 'This statute has served since its inclusion, in substance, in the original Judiciary Act as a "legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" ' *Harris v. Nelson*, 394 U.S. 286, 299 [] (1969), quoting *Price v. Johnston*, 334 U.S. 266, 282 [] (1948)."

Reliance upon the All Writs Act is particularly appropriate since petitioners sought to thwart by guile the Permanent Injunction. As one court observed:

"It is well settled that the courts of the United States have the inherent statutory (28 U.S.C.A. § 1651) power and authority to enter such orders as may be necessary to enforce and effectuate their lawful orders and judgments, and to prevent them from being thwarted and interfered with by force, guile, or otherwise."

Mississippi Valley Barge Line Co. v. United States, 273 F. Supp. 1, 6 (E.D. Mo. 1967), *aff'd sub nom. Osbourne v. Mississippi Valley Barge Line Co.*, 389 U.S. 579 (1968).

D. The Due Process Rights of Petitioners Were Not Violated.

The determination of whether due process has been afforded petitioners entails a balancing of their interests with the public interest in the effective enforcement of court orders. As this Court observed in *Mathews v. Eldridge*, 424 U.S. at 319, 334-35 (1976):

"[R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. [Citations omitted.] More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Due process "expresses the requirement of 'fundamental fairness.'" *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981). Fundamental fairness entitled petitioners to a fair trial. Here, the prosecution was initiated and continued through trial by the District Court. Once charged by the Order to Show Cause, petitioners had the protection of all the systemic safeguards present in any criminal prosecution. Moreover, petitioners had the additional protection of close judicial scrutiny over the Special Prosecutors. As the Second Circuit observed:

"Prosecutors appointed under Fed. R. Crim. P. 42(b) are particularly susceptible of judicial control. They are under close judicial scrutiny as was the case here. By the very act of appointing a special prosecutor, the judge plays a key role in the decision about whether to prosecute. Hence, the prime danger that the special prosecutor will use the threat of prosecution as a bargaining chip in civil negotiations is practically nil."

(Pet. App. A-10)

These traditional safeguards were in no way compromised by (a) Vuitton's compensation of the Special Prosecutors, whose natural concerns for their own reputations engendered a high degree of care in the conduct of the prosecution, (b) the Special Prosecutors' production to the Florida Bankruptcy Court of evidence clearly relevant to the case before it,¹² (c) Sol Klayminc's frivolous lawsuit against Mr. Bainton and his law firm, (d) Vuitton's post-trial pursuit of civil remedies against Mr. Young, or (e) plea agreements with Messrs. Rochman and Pariseault approved by the District Court.

The rights of petitioners to a fair trial were furthered by the absence of any conflict of interest between the Special Prosecutors' two clients, the United States and Vuitton. As the District Court noted:

“[Vuitton] want[s] the Court to vindicate its so frequently disobeyed orders by means of general

¹² After petitioners were arraigned and after transcripts of the taped conversations were produced to petitioners during pretrial discovery, Sol and Sylvia Klayminc filed a bankruptcy petition pursuant to Chapter 7 of the Bankruptcy Code, 11 U.S.C. § 701 *et seq.* Vuitton had one liquidated and one non-liquidated general unsecured claim against the Klaymincs, each arising from their trafficking in counterfeit Vuitton merchandise, an intentional tort. (J.A. 108-17) The non-dischargeability of Vuitton's claims were thus clear as a matter of public record and well-settled law. See 11 U.S.C. § 523(a).

As a matter of simple arithmetic and logic, Vuitton's interests would have been best served if its general unsecured claims were the only ones not discharged. The Klaymincs' discharge hearing was held on December 6, 1983, well prior to the criminal contempt trial, when the video and audio tapes would become matters of public record. (R. 694)

The Special Prosecutors nonetheless knew about the tapes and knew that statements on the tapes could constitute adequate grounds to bar the Klaymincs from obtaining a general bankruptcy discharge upon the ground of bankruptcy fraud. They therefore provided the tapes to the Bankruptcy Court, but took no testimony or other discovery from the Klaymincs. (R. 695)

and specific deterrents so [disobedience of those orders] will not be regarded as a trivial matter in the future."

(R. 218) The interests of Vuitton and the United States were coterminous—ensuring that court orders are not disobeyed. Furthermore, to the extent that any conflict of interest may have existed in theory, Vuitton's express subordination of its interests to those of the United States relieved the Special Prosecutors of any hypothetical ethical disability. Model Code of Professional Responsibility DR 5-105(c) (1979).

Petitioners' allegations of due process violations do not therefore even approach those rejected in *Wright v. United States*, 732 F.2d 1048 (2d Cir. 1984), *cert. denied*, — U.S. —, 105 S. Ct. 779 (1985), namely that at best petitioners were deprived of:

"the chance that, with another prosecutor [they] might have undeservedly escaped indictment and consequent conviction for crimes of which [they] were properly found to be guilty."

732 F.2d 1048, 1058. In sum, petitioners received a fair trial notwithstanding the appointment of attorneys for a civil litigant to prosecute the case.

In formulating due process standards, this Court must also weigh the public interest in maintaining an independent judiciary capable of enforcing its orders. Everyone concedes the desirability of the prosecution of criminal contempt proceedings by the Justice Department. Accordingly, the Justice Department should, as occurred in this case, be afforded notice of the facts constituting the alleged contempt and the first opportunity to prosecute the case.

The Solicitor General, and by implication petitioners, concede that the Justice Department will not be in a position to prosecute every criminal contempt proceeding which district courts conclude warrants prosecution. Such cases must nonetheless be prosecuted if the independence of the judiciary is to be maintained. The present practice of appointing the attorney for a civil litigant is the only practical means of effectively achieving this result. The Second Circuit in *Musidor* considered this issue and concluded that “[t]here is no fund out of which to pay other counsel [to prosecute criminal contempts] This is not the kind of case for which legal aid societies or public defenders are available.” *Musidor*, 658 F.2d at 65.

Petitioners argue that “[t]he appointment of *pro bono* counsel from established law firms” would be practical. (Pet. Br. 27) These prosecutions often entail substantial investigative expense and hundreds of hours of attorneys’ time. Petitioners, therefore, cannot reasonably suggest that private law firms would necessarily make their attorneys available on a *pro bono* basis to prosecute a significant number of criminal contempts.

The Solicitor General contends that “the court should have no difficulty in finding a disinterested member of the bar for presenting and prosecuting the charges.” (Brief of the Solicitor General at 26) The Solicitor General suggests that such “disinterested” counsel have been recompensed by the “Administrative Office of the United States Courts (the “Administrative Office”) in the past and that these funds will continue to be available. (*Id.* at 26 n.20) These conclusory projections are entirely speculative and do not withstand scrutiny.

In an effort to provide the Court with further detail, we have inquired of the Administrative Office respecting

the bases for these claims. (L. 53)¹³ In a letter from David N. Adair, Jr., Assistant General Counsel for the Administrative Office, to Mr. Devlin, dated October 2, 1986, Mr. Adair advised us that such payments had been authorized in only three contempt proceedings over the past three years. (L. 58) While he was not at liberty to disclose the specific amounts paid in each of these cases, the Assistant General Counsel advised us that the total payments in these three cases amounted to less than \$15,000. (L. 59) The payments were made from a fund allocated to the courts for "other services." (L. 59) As the descriptive explanation annexed to Mr. Adair's letter indicates (L. 60-73), these services include substantial expenses necessary for the maintenance of the federal courts. Due to the *de minimus* amount of the funds disbursed to special prosecutors, this explanation does not include a provision for the compensation of these attorneys. Indeed, the Administrative Office was unable to estimate whether funds would be available in the future to recompense special prosecutors.

Accordingly, the Solicitor General's summary projections represent no more than speculation. Neither the Justice Department nor the Administrative Office can predict whether funding could be made available to compensate special prosecutors. Absent a substantial appropriation for this purpose, the appropriations schedule annexed to the Assistant General Counsel's letter suggests that such funding is not presently available. That schedule indicates that, during fiscal year 1986, the Administrative Office has expended all of the funds appropriated to it by the Congress for that fiscal year. (L. 60)

Should this Court decide that special prosecutors must be compensated by the federal government, these expenses

¹³ References to certain documents lodged with the Court are in the form L. [page].

are likely to increase geometrically. Trademark counterfeiting is only one area where criminal contempt prosecutions are common, but this area alone could overwhelm an already overburdened fisc. Trademark counterfeiting has recently been called "[p]erhaps the world's fastest-growing and most profitable business . . ." O'Donnell, *The Counterfeit Trade*, Business Week, December 16, 1985, (Cover), at 64. The International Trade Commission has estimated that businesses in the United States have lost approximately three billion to six billion dollars due to trademark counterfeiting. *The Effects of Foreign Product Counterfeiting on U.S. Industry*, U.S.I.T.C. Pub. No. 1479, xiv (January 1984). And as the District Court in this case observed, "[t]he agility and resourcefulness of wholesale and retail purveyors of counterfeit trademark goods is at one with the business acumen of cocaine dealers, as is demonstrated in Vuitton's previous attempts by litigation to duel distribution of cheap bogus merchandise which dilutes its valued mark." (Pet. App. C-15 n.4) Operating beyond the fringes of legality, counterfeiters maintain few, if any, records of their activities and uniformly fail to report their illicit income to the authorities.

Accordingly, the expense involved in enforcing injunctions in trademark counterfeiting cases is necessarily substantial because these prosecutions often require considerable investigative effort. In this respect, this case is not unique. Civil litigation serves to educate counterfeiters. They learn to conduct their business surreptitiously and to forego the maintenance of any records reflecting their activities. As a result, substantial undercover investigations are a precondition to the successful consummation of many criminal contempt proceedings. Even if knowledgeable private counsel were prepared to accept appointments recompensed at the \$75 per hour rate (L. 57) (a

somewhat questionable assumption), as has been done in the past, the expenses involved in the investigatory process would drive the cost of such proceedings to a level which, as a practical matter, could be funded only by the owners of the intellectual property being pirated.

Accordingly, the current practice of specially appointing the attorney for the civil litigant to prosecute a criminal contempt proceeding is the only feasible way to maintain the independence of the judiciary while protecting the legitimate interests of alleged contemnors.

II.

This Court Should Not Deviate from Its Traditional Practice Regarding the Amendment of the Federal Rules.

Petitioners and the Solicitor General urge this Court to amend Rule 42(b) effectively to limit the district courts' discretion regarding the counsel whom it may appoint to prosecute a criminal contempt. In essence, petitioners and the Solicitor General argue that this Court should disregard the role of the Advisory Committee on Rules and the Congress in adopting and amending the Federal Rules of Criminal Procedure.

This Court should not use this case as a vehicle to amend Rule 42(b) through the use of its supervisory powers. The procedures for adopting and amending the Federal Rules of Criminal Procedure are set forth in 18 U.S.C. § 3771. That section expressly states that "[s]uch rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May,

and until the expiration of ninety days after they have been thus reported." 18 U.S.C. § 3771. Thus Congress is to review any rules and amendments before they are rendered effective. If this Court uses its supervisory powers to amend Rule 42(b), it will usurp this Congressional function.

Since important policy considerations are implicated by any substantive amendment to Rule 42(b), this Court should not disregard the Advisory Committee on Criminal Rules. That Committee's function is to "carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law." 28 U.S.C. § 331. Chief Justice Warren emphasized the importance of the Advisory Committee, stating:

"It is essential that our rules of court be up-to-date and all amendments should be studied and recommended by committees with as broad an outlook and base as possible. Accordingly these committees include representatives of the bar, the judiciary and the legal scholars and for their ideas they will draw upon the bench and bar of the country as a whole and particularly the Judicial Conferences in all eleven of the Federal circuits.

"Experience has shown that in order to promote simplicity in procedure, the just determination of litigation and the elimination of unjustifiable expense and delay, it is essential that the operation and effect of the Federal rules of practice and procedure should be the subject of continuous study. Such study is the objective of the committees being announced today, and every judge, practicing lawyer, and legal scholar will be afforded the opportunity to participate—to state his views—with assurances that those views will be given consideration."

"Announcement of the Chief Justice of the United States, April 4, 1960," reprinted in *Federal Criminal Code and Rules*, vii-viii (West 1986).

In the event the Court concludes that Rule 42(b) should be modified to preclude the appointment of a civil litigant's counsel to prosecute a criminal contempt proceeding, it should direct the Advisory Committee on Criminal Rules to make a plenary analysis, and to report its conclusions to the Court. Any amendment then considered advisable by this Court should be submitted to Congress. In short, a procedure has been created by Congress and by this Court through which amendments to the Federal Rules of Criminal Procedure are proposed, considered and promulgated. Petitioners and the Solicitor General have failed to offer any persuasive reason for the Court to deviate from that procedure and to amend Rule 42(b) through the use of its supervisory powers.

III.

Should This Court in the Exercise of Its Supervisory Powers Elect to Review Practice Under Rule 42(b), It Should Ratify Present Practice as the Most Feasible Alternative.

Both petitioners and the Solicitor General ask this Court to disregard its usual practices and to consider modifying practice under Rule 42(b) through the use of its supervisory powers in this case. Should the Court choose to do so, we submit that petitioners and the Solicitor General have failed to advance a feasible alternative to the appointment of a civil litigant's counsel to prosecute criminal contempt proceedings. For the reasons set forth *infra* at 19-24, such appointments represent the only practical means of enforcing court orders while preserving the independence of the judiciary and protecting the legitimate interests of defendants.

IV.

The Sentences Imposed Were Neither Excessive nor Based Upon Improper Considerations.

The determination of a proper sentence is a solemn decision singularly within the competency of the district courts. This Court has held that because there is no statutory limit upon a district court's sentencing power in cases of criminal contempt, appellate courts have "a special responsibility for determining that the power is not abused . . ." *Green v. United States*, 356 U.S. 165, 188 (1958), partially overruled on other grounds, *Bloom v. Illinois*, 391 U.S. 194 (1968). Review of the sentencing decisions here shows that the District Court carefully exercised its responsibility and its actions do not constitute an "arbitrary use of the power in abuse of discretion." *United States v. Galante*, 298 F.2d 72, 75 (2d Cir. 1962).

The sentences imposed by the District Court set forth a range of punishment whereby those who most flagrantly violated court orders were dealt with more severely than those with less culpability. The District Court carefully and properly considered the nature of the offense, the culpability of each defendant, the consequences of the behavior, and the importance of deterring such conduct in the future.¹⁴

¹⁴ In considering general deterrence, the District Court could properly consider Sol Klayminc's words on this topic:

"Mr. Sol Klayminc: Then so somebody snitched on me and they got me. Okay they walked in on me and I was hit with a quarter of a million dollars of finished goods.

"Mr. Gunnar Askelund: Here in New York?

"Mr. Sol Klayminc: And I felt at that time, hell the worst that will happen they'll sue me for ten-twenty thousand dollars and I'll make a deal and get out of it. But is wasn't that easy.

(footnote continued on following page)

The District Court imposed sentence upon seven defendants. Sol Klayminc, whom the Court found to be "the principal malefactor" (R. 241), and who committed this crime "while on probation" from his prior conviction (R. 240), was sentenced to imprisonment for five years. Young, described by the Court as "a principal factor in the plan," because he was to supply fabric from his source in Japan, had, as conceded by his counsel, by his conduct wilfully violated a similar injunction of the United States District Court for the Central District of California in *Vuitton et Fils S.A. v. J. Young Enterprises*, 644 F.2d at 778-79 (R. 214-15, 219-41),¹⁵ and was therefore, sentenced to imprisonment for two and one-half years. Barry Klayminc, who had consented to the Permanent Injunction, but nevertheless assisted his father in the criminal enterprise, was sentenced to imprisonment for nine months. The District Court specifically noted in Barry Klayminc's case that he had "a lesser culpability . . . in part [because] of his loyalty

(footnote continued from preceding page)

"Mr. Gunnar Askelund: Right.

"Mr. Sol Klayminc: We-ah, so it went to Court, and got a trademark attorney who put up 10Gs right away before I got battered, and my regular attorney who defended me and then they knocked it down from a—from a felony to misdemeanor.

"Mr. Gunnar Askelund: Right.

"Mr. Sol Klayminc: But once it was a misdemeanor we felt that, I told my attorney let's plead guilty and let's take the punishment. What could it be a misdemeanor?

"Mr. Gunnar Askelund: Right.

"Mr. Sol Klayminc: Well they told that if you plead guilty that ah—then they got you on a civil case. And they can sue you—you know—because you're admitting you're guilty."

(R. 724-25)

¹⁵ The District Court could also have properly considered the fact that Young was charged (but not tried or convicted) previously with a similar offense. *Vuitton et Fils S.A. v. J. Young Enterprises*, 644 F.2d at 778-79.

and faith to his own father." (R. 242) Cariste, who actively participated in the plan by, among other actions, delivering 25 counterfeit Vuitton bags and cutting material for 50 others, was also sentenced to imprisonment for nine months. Helfand, who helped to arrange the April 5, 1983, meeting between Sol Klayminc and Mr. Weinberg and who continued to be an active participant in the contempt despite his knowledge of the injunction, was found to be "less culpable" than the other defendants, and was sentenced to imprisonment for six months. (R. 242)

The vindication of the integrity of a court-ordered injunction, and of the protection of the intellectual property right that injunction is designed to protect, should be viewed by all as matters of serious concern. The importance of protecting intellectual property owners against counterfeitors had also been strongly recognized by Congress. In the Trademark Counterfeiting Act of 1984,¹⁶ Congress has recognized that the virtual absence of "criminal penalties for the sale of goods and services through the use of false trademarks" has "emboldened counterfeiters" and has sought through the Act "to provide both Federal prosecutors and trademark owners with essential tools for combating this insidious and rapidly growing form of commercial fraud." S. Rep. No. 526, 98th Cong., 2d Sess. at 1 (1984).

Petitioners contend that the District Court relied upon "improper considerations" because the Court may not, as it did here, attempt through sentencing to vindicate the rights of the holder of a valuable property right. This Court, in *United States v. United Mine Workers*, 330 U.S. 258 (1947), stated that in imposing a penalty for criminal

¹⁶ Pub. L. No. 98-473, Ch. XV, 98 Stat. 1837 (1984), codified at 15 U.S.C. §§ 1051 *et seq.* and 18 U.S.C. § 2320.

contempt, the District Court could properly consider (i) "the extent of the willful and deliberate defiance of the court's order," (ii) "the seriousness of the consequences of the contumacious behavior," (iii) "the necessity of effectively terminating the defendant's defiance as required by the public interest," and (iv) "the importance of deterring such acts in the future." 330 U.S. at 303. The District Court therefore properly considered the impact of petitioners' conduct upon Vuitton and the need for deterrence of future violations of its orders. Accordingly, the sentences were proper in all respects.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Dated: October 27, 1986

Respectfully submitted,

J. JOSEPH BAINTON
ROBERT P. DEVLIN
45 Rockefeller Plaza
New York, New York 10111
Telephone: (212) 841-5700

*Specially Appointed Attorneys
for the United States of
America*

JOSEPH J. IAROCCI, Esq.

On the Brief.

IN THE
Supreme Court of the United States
 OCTOBER TERM, 1986

DEC 30 1986

JOSEPH F. SPANIOL, JR.
CLERK

GERALD J. YOUNG, GEORGE CARISTE,
 SOL N. KLAYMINC, NATHAN HELFAND, *Petitioners*,
 v.

UNITED STATES, EX REL. VUITTON ET FILS
 S.A., et al., *Respondent*.

BARRY DEAN KLAYMINC, *Petitioner*,
 v.

UNITED STATES, EX REL. VUITTON ET FILS
 S.A., et al., *Respondent*.

**On Writs Of Certiorari To The United States
 Court Of Appeals For The Second Circuit**

REPLY BRIEF FOR PETITIONERS

WILLIAM WEININGER
 845 Third Avenue
 New York, NY 10022
 (212) 308-3767

Counsel for Petitioner
Sol Klaymine

THOMAS R. MATARAZZO
 4009 Fifth Avenue
 Brooklyn, NY 11232
 (718) 853-4040

Counsel for Petitioner
Nathan Helfand

MITCHELL B. CRANER
 666 Fifth Avenue
 13th Floor
 New York, NY 10103
 (212) 757-9350

Counsel for Petitioner
George Cariste

JAMES A. COHEN
 WASHINGTON SQUARE LEGAL
 SERVICES, INC.

715 Broadway, 4th Floor
 New York, NY 10003
 (212) 505-7400

Counsel for Petitioner
Barry Dean Klayminc

On the Brief:

JILL FRIEDMAN
 LISA GREENMAN
 TIMOTHY JAMES
 SHERI LIPMAN
 Legal Interns.

LEONARD J. COMDEN
 WASSERMAN, COMDEN
 & CASSELMAN
 5567 Reseda Blvd.
 Suite 330
 Tarzana, CA 91356
 (818) 705-6800

Counsel for Petitioner
Gerald Young

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In this Reply Brief, petitioners will respond to the contention that due process was not violated by the appointment of an interested private attorney to investigate and prosecute a serious criminal contempt and will discuss the applicable standard for review.¹

ARGUMENT

I. RESPONDENT HAS INCORRECTLY BALANCED THE DUE PROCESS CRITERIA SET FORTH IN *MATHEWS V. ELDRIDGE*.

Three interests must be balanced in order to decide what process is due in a given situation: the private interest of the individual involved; the risk that the procedures used will lead to an erroneous deprivation of rights and the likely value of other procedural safeguards; and the Government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976). Analysis of these three factors compels the conclusion that the appointment of the interested special prosecutor violated the due process rights of the defendants.

In this case, the first *Mathews* factor is personal liberty. Due process requires greater safeguards where the interest at stake is recognized by law to be of high value. The individual's interest in personal liberty is perhaps the most important in our society. *Lassiter v. Department of Social Services*, 452 U.S. 18, 25-27 (1981).

An examination of the second *Mathews* factor, the risk of an erroneous deprivation of this right, also strongly

¹ In Point II of Respondent's Brief and in their reformulated second Question Presented, respondent claims that petitioner and the United States as *amicus curiae* ask this Court to amend Rule 42(b) without following the statutory procedure for such amendment. 18 U.S.C. § 3771. This is simply untrue. Neither the terms of Rule 42(b) nor the Advisory Committee's notes addresses the issues presented by this case.

supports petitioners. Where an interested prosecutor with no training, supervision or accountability conducts an investigation (particularly a sting) and prosecution, the risk of an unreliable result is especially high. The exercise of broad prosecutorial discretion by the interested private attorney causes private interests to infect the normal policy-making and implementation function of the public prosecutor. When these influences are combined with the exercise of deception and misrepresentation inherent in a sting operation, the resulting improper manipulation raises the distinct possibility that initial targeting and the failure to offer opportunities to dispose of the case prior to trial were all motivated by private interests and not the public's. In this case, the long history of animosity between Bainton, Vuitton and the defendants increased the risk that the result would not be fair.

In order to avoid injection of private interest into the criminal justice system and the impermissible risk that entails, the United States Government recommends in its *amicus* brief that serious out-of-court contempts first be referred to the United States Attorney's Office. Under no circumstances would an interested attorney be permitted. These procedures offer an additional safeguard which would greatly reduce the risk of an improper deprivation of liberty.

The third *Mathews* factor to be considered is the interests of the government. The government has a strong interest in prosecuting individuals who have violated court orders. 18 U.S.C. § 401(3). But, the government has no interest in having the prosecution conducted by one who labors under a conflict of interest.² Cf. 18 U.S.C.

² Respondent claims that Vuitton "express[ly] subordinat[ed] . . . its interests to those of the United States. . ." Brief for Respondents

§ 208.

Only two reasons have been offered in support of interested special prosecutors. First, it is said that the interested party's access to information justifies that person's appointment. *McCann v. New York Stock Exchange*, 80 F.2d 211 (2d Cir. 1935). However, this reasoning ignores the fact that public prosecutors commonly obtain information from others to conduct prosecutions—often in extremely complicated matters. There is no reason that this cannot occur in cases of serious criminal contempt. The second reason, which prompted the Second Circuit decision permitting this practice, *Musidor, B.V. v. Great American Screen*, 658 F.2d 60 (2d Cir. 1981), cert. denied, 455 U.S. 944 (1982), is the "practicalities of the situation." The *Musidor* court emphasized its concern that "[t]here is no fund out of which to pay other counsel. . . ." *Musidor*, 658 F.2d at 65. Respondent continues to rely on this rationale. Resp. Br. at 3, 17, 23. This claim has been more than adequately answered by the Administrative Office of the United States Courts which has said that it has a "fund out of which to pay other counsel." Indeed, this fund has been drawn upon by disinterested special prosecutors appointed pursuant to Rule 42(b). See Brief for the United States as Amicus Curiae (Amicus Br.) and Letter from Administrative Office of the United States Courts, dated October 2, 1986, lodged at L-56.³

at 22 (Resp. Br.). Unfortunately, no portion of the record is referenced, nor can one be, since nothing in the record will support this claim.

³ Respondent also claims that \$75 per hour, the amount available through the Administrative Office of the United States Courts, will deter disinterested attorneys from accepting assignments. It is ironic to suggest that \$75 per hour is not enough since it is on par with other statutorily-created appointments held by lawyers. See 18 U.S.C.

Given that all three *Mathews* factors point to the need for a disinterested special prosecutor, the use of an interested special prosecutor here violates defendant's due process rights.

II. THE RULE OF AUTOMATIC REVERSAL SHOULD APPLY WHERE AN INTERESTED PRIVATE PARTY IS APPOINTED TO PROSECUTE A SERIOUS CRIMINAL CONTEMPT.

The Solicitor General of the United States agrees with petitioners' position that it was error for the District Court to authorize an interested private lawyer to investigate and prosecute this case. The *amicus* brief raises the further question of what standard this Court should apply in reviewing the error. *Amicus* Br. at 29. The appropriate standard to be applied is that such an error requires reversal without a showing of actual prejudice. This same standard, derived from the Court's harmless error jurisprudence, would apply whether this Court bases its finding of error on Constitutional grounds, or, instead, on its supervisory powers.⁴

§ 3006A (attorneys compensated at a rate not to exceed \$60 for in court time and \$40 for out of court time). It cannot be seriously argued that attorneys filling these positions do not perform adequately due to the low rate of compensation in comparison to the rates paid by this country's large law firms. Respondent further argues that sting investigations are very expensive and that the expense will inhibit their use by a disinterested prosecutor. Resp. Br. 22-26. Given the higher level of expertise and training required to conduct a sting investigation and the increased risks to the defendant, it is desirable that even disinterested special prosecutors refrain from undertaking sting operations.

⁴ As articulated in the Government's brief, this Court's supervisory power provides an adequate ground on which to invalidate the procedure used here. *See generally Amicus* Br.

Courts have consistently refused to sustain convictions in cases where the effect of an error is very difficult to ascertain or is unknowable. Most commonly, these are cases in which the universe of information on review is incomplete, especially where the error is not a part of the record. *Rose v. Clark*, 54 U.S.L.W. 5023, 5026 n. 7 (1986). Courts have also refused to sustain convictions, without regard to the strength of evidence against a defendant, in cases where the error offends fundamental values in our system of justice. *Vasquez v. Hillery*, 54 U.S.L.W. 4068 (1986). The error in the petitioners' case requires reversal on each of these two grounds.

In *Rose v. Clark, supra*, this Court applied harmless error analysis to a malice instruction which violated the rule of *Sandstrom v. Montana*, 442 U.S. 510 (1979). The decision was based on the joint proposition that the trial record was complete and that it could have established guilt beyond a reasonable doubt.⁵ The Court emphasized that the error "did not affect the composition of the record" and thus did "not require any difficult inquiries concerning matters which might have been, but were not placed in evidence." *Rose v. Clark, supra*, at n. 7. See also *Rushen v. Spain*, 464 U.S. 114 (1983), *reh'g denied*, 465 U.S. 1055 (1984); *U.S. v. Lane*, 54 U.S.L.W. 4123 (1986). The rationale for refusing to adopt a *per se* rule requiring reversal in *Rose, Rushen* and *Lane* was that the universe of relevant information was closed. In such cases a court can be confident of its ability to evaluate the impact of the error in view of the complete record, and thereby to determine whether the result was reliable.

In *Vasquez v. Hillery, supra*, five Justices held that racial discrimination which affected the composition of the

⁵ The case was remanded for application of the harmless-error test.

indicting grand jury required automatic reversal of the resulting conviction.⁶ Their rationale was that it is impossible to measure the impact of impermissible discrimination on the grand jury's exercise of discretion. The majority agreed that even ultimate conviction on the indicted offense does not suggest at all

that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature of or very existence of the proceedings to come . . . Once having found discrimination in the selection of a grand jury, we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted.

Id. at 4071. The grand jury's discretion to indict for a more or less serious offense, if at all, is similar to the prosecutor's even more expansive discretion. Even accepting, *arguendo*, the objection implicit in the dissent that there was no doubt that any grand jury would have exercised its discretion in favor of indicting the defendant for murder, the principle emerges unscathed: where the universe of information is not complete, courts cannot apply harmless error analysis.

In *Holloway v. Arkansas*, 435 U.S. 475 (1978), this Court held that when a trial court improperly required joint representation of co-defendants, automatic reversal

⁶ In footnote 30 of petitioners' brief (Pet. Br. at 24), petitioners incorrectly claimed that this Court had not ruled on a criminal contempt defendant's right to indictment by grand jury. In fact, in *Green v. U.S.*, 356 U.S. 165 (1958), this Court held that criminal contempt defendants had neither the right to indictment by grand jury, nor the right to trial by petit jury. In *Bloom v. Illinois*, 391 U.S. 194 (1968), this Court established a right to a jury trial in serious criminal contempts, thus overruling that portion of *Green*. The Court has not since re-examined the right of a defendant in a serious criminal contempt to be indicted by a grand jury.

was required because the defense attorney was laboring under a conflict of interest. The Court enumerated multiple instances where a lawyer's discretion might be infected by the constraints and motivations of concurrent representation of two clients:

For example, in this case it may well have precluded defense counsel for Campbell from exploring possible plea negotiations . . . [A] conflict may also prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another. Examples can be readily multiplied.

Id. at 489-90. This Court emphatically rejected any requirement that the injured defendant show prejudice because it "would not be susceptible of intelligent, even-handed application." The Court distinguished trial error, the scope of which it deemed commonly measurable on review, from the harm of joint representation.

[T]o assess the impact of a conflict of interests on the attorney's options, tactics, and decisions . . . would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require . . . unguided speculation.

Id. at 490-91. The same problem of immeasurability applies with equal or greater force to the work of the prosecutor, who has vast discretionary power.⁷ See also

⁷ In recognition of the seriousness of the problem and the impossibility of measuring the impact of competing interests, Congress sought to discourage them by prescribing felony penalties for government officers or employees in the executive branch who participate in matters in which they have financial interests. 18 U.S.C. § 208(a). In this case, Bainton's conflict of interest was, among other things, financial, in that both he and his client Vuitton stood to benefit financially from convictions in the criminal contempt actions.

Payne v. Arkansas, 356 U.S. 560 (1958) (regardless of independent evidence supporting a conviction, it is impossible to assess from a general verdict what weight the jury might have given to a coerced confession improperly admitted into evidence).

The cases demonstrate that error which is outside a closed record, gives reviewing courts the impossible task of speculating retrospectively about what might have been in people's minds. Attempting such inquiries would be unlikely to yield useful information, and it would invite increased litigation. In this case, it is impossible to identify the multiple instances when Bainton exercised discretion. He chose whom to investigate and how. He decided how to manipulate the various players, using the power of his "office" to extend immunity and to authorize and structure deals in exchange for cooperation. This exercise of unbridled discretion both created and infected the record for review.

Obviously, this Court had concerns beyond the incomplete records in *Vasquez*, *Holloway* and *Payne*. The errors in those cases threatened values fundamental to the criminal justice system, worthy of protection in their own right, even though they are unrelated or only partially related to the truth-seeking function of the trial. In *Vasquez*, four Justices agreed that "racial discrimination in the selection of grand juries is intolerable even if the defendant's guilt is subsequently established in a fair trial." *Rose v. Clark*, *supra*, at 5028 (concurrence by STEVENS, J., citing *Vasquez v. Hillery*, *supra*). See also *Allen v. Hardy*, 54 U.S.L.W. 3856 (1986) [rule of *Batson v. Kentucky*, 54 U.S.L.W. 4425 (1986), prohibiting racial discrimination in selection of petit jury serves values besides truthfinding function of criminal trial: it promotes public confidence in administration of justice].

By the same token, the error here—allowing an interested private attorney untrammelled discretion and vast unsupervised⁸ authority in the investigation and prosecution of a serious criminal contempt—should be exempted from harmless error analysis. The right to be prosecuted by a publicly accountable official, free of private motives, protects an independent value. Beyond its impact on any given defendant, employing an interested prosecutor undermines society's confidence in the justice system. It is essential for citizens in a free society to be secure that the awesome machinery of the government will not be invoked against them except according to uniform and knowable standards. Prosecution by an interested private party violates that trust between individual and state. A conviction stemming from it should not be permitted to stand.

⁸ The record reveals that nominal involvement by the District Court in this case did not amount to any substantive supervision of the sting operation. Judges, as a practical and institutional matter, are not properly situated to supervise complex investigations or prosecutions. Furthermore, their participation, to the extent that it is possible and sanctioned, raises corresponding separation of powers concerns.

CONCLUSION

The decision of the Second Circuit should be reversed and the Order to Show Cause dismissed.

Respectfully submitted,

WILLIAM WEININGER
845 Third Avenue
New York, NY 10022
(212) 308-3767

Counsel for Petitioner
Sol Klayminc

THOMAS R. MATARAZZO
4009 Fifth Avenue
Brooklyn, NY 11232
(718) 853-4040

Counsel for Petitioner
Nathan Helfand

MITCHELL B. CRANER
666 Fifth Avenue
13th Floor
New York, NY 10103
(212) 757-9350

Counsel for Petitioner
George Cariste

JAMES A. COHEN
WASHINGTON SQUARE LEGAL
SERVICES, INC.
715 Broadway, 4th Floor
New York, NY 10003
(212) 505-7400

Counsel for Petitioner
Barry Dean Klayminc

On the Brief:
JILL FRIEDMAN
LISA GREENMAN
TIMOTHY JAMES
SHERI LIPMAN
Legal Interns.

LEONARD J. COMDEN
WASSERMAN, COMDEN
& CASSELMAN
5567 Reseda Blvd.
Suite 330
Tarzana, CA 91356
(818) 705-6800

Counsel for Petitioner
Gerald Young

